Supreme Court, U.S.
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No. _____

# In the Supreme Court of the United States

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BRAD LIEBERMAN, PETITIONER

*v.*

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT*

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the post–incarceration civil commitment of a convicted sex offender under a state civil commitment statute violate the former offender's rights under the Due Process Clause of the Fourteenth Amendment, when he presented undisputed evidence that at the time of his civil commitment, he possessed full volitional control over his behavior?

## PARTIES TO THE PROCEEDINGS

Brad Lieberman is the Petitioner, and the People of the State of Illinois is the Respondent. There are no other parties.

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## INTRODUCTION

This Court has held that civil commitment of a convicted sex offender after imprisonment ends is not permitted in the absence of substantial, competent proof that the offender presently suffers from "serious difficulty in controlling behavior." *Kansas* v. *Crane*, 534 U.S. 407, 412–13 (2002); *see also Kansas* v. *Hendricks*, 521 U.S. 346, 357–58 (1997). Neither a predisposition to violence nor "dangerousness" is enough to support commitment. *Hendricks*, 521 U.S. at 357–58.

In *Hendricks* and *Crane*, this Court "underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.' That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment." *Crane*, 534 U.S. at 412, (quoting *Hendricks*, 521 U.S. at 360, 372–73). Substantial proof of "serious difficulty in controlling behavior" supplies the constitutional linchpin. Therefore, commitment of a "dangerous sexual offender . . . without *any* lack–of–control determination" cannot be justified. *Crane*, 534 U.S. at 412 (emphasis in original).

For offenders in Illinois, however, the state courts have cast doubt on those well established propositions. The record here—including a wealth of undisputed expert testimony—makes clear that the Petitioner possessed full volitional control at the time of his commitment trial. That evidence affirmatively

contradicted the requirements of *Crane*. But the courts below refused even to consider that evidence or to analyze the fundamental constitutional issue it presented under this Court's cases.

The question presented here is not limited to the facts of Petitioner's case. The issue will affect hundreds, if not thousands, of civil commitment cases across the country, because, as this Court ominously predicted, civil commitment statutes have become "a mechanism for retribution," a routine stage in the post–conviction process for sex offenders. *Crane*, 534 U.S. at 412. The political and emotional appeal that accompanies the civil prosecution of sex offenders threatens to eviscerate constitutional requirements that should be carefully observed in each case.

The Illinois appellate court's opinion here shows clearly how, in practice, post–incarceration civil commitment has moved away from *Hendricks* and *Crane* as it has become an adjunct to the criminal process. Petitioner's volitional control was the central issue raised in the appeal below. Yet, the appellate court's opinion refused to acknowledge the constitutional issue and downplayed the importance of the unequivocal. Most tellingly, the appellate court's opinion never even cited *Hendricks* or *Crane*.

The Illinois appellate court's silence about the constitutional limits on civil commitment of sex offenders is tantamount to a proclamation that the limits set by *Hendricks* and *Crane* need not be observed in Illinois. This Court's intervention is warranted to reaffirm *Hendricks* and *Crane* and protect the civil liberties of individuals who have already been punished for their crimes.

## OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, is cited as *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 884 N.E.2d 160, 318 Ill. Dec. 605 (1st. Dist. 2007) (reprinted at App. 1a–44a).

## JURISDICTION

The order of the Supreme Court of Illinois denying Petitioner's petition to appeal as a matter of right and, alternatively, for leave to appeal, was entered on September 24, 2008. The judgment and order of the Appellate Court of Illinois, First Judicial District, entered September 28, 2007, is therefore the final judgment rendered by the highest court of Illinois in which a decision could be had. It is the judgment sought to be reviewed here. The statute conferring jurisdiction on this Court is 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION

The Fourteenth Amendment of the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1.

## STATEMENT OF THE CASE

After a jury trial, Petitioner Brad Lieberman ("Lieberman" or "Petitioner") was adjudged a sexually violent person under the Illinois Sexually Violent Persons Commitment Act ("SVPCA") by an order entered February 16, 2006. At the jury trial, the State called only two witnesses. Both were clinical psychologists who testified as experts about

Petitioner's psychological status. (Tr. Vol. 4 at 41–42; Tr. Vol. 9 at 27).

The key testimony involved Petitioner's current ability to control his behavior. Dr. Jacqueline Buck testified that Petitioner possesses full volitional control and capacity, i.e., the ability to choose whether he will act on any urges he may experience. (Tr. Vol. 7 at 104). Her testimony was unequivocal: "Q. Brad had volitional control because he is not mentally ill, is that true? A. You bet. That's true." *Ibid.*

Dr. Buck made a clear distinction between lack of control and predisposition. She testified that Petitioner's mental disorders "warp his perceptions and his feelings and allow him to exhibit sexually assaulting behavior," but they are not related to the control of his behavior. (Tr. Vol. 7 at 103). The two concepts, predisposition and control, cannot be lumped together—it would be "mixing apples and oranges." (*Id.* at 104). Petitioner's mental disorders may have predisposed him to commit acts of sexual violence, but they do not reduce his ability or capacity to control his behavior. (*Id.* at 104, 105, 107, 109–10).

Dr. Buck's testimony was not focused on Petitioner's volitional control at the time he committed the crimes more than twenty–five years ago. Rather, Dr. Buck expressed the opinion at trial that Petitioner possesses full volitional control *now*. She explained that people who lack volitional control are "significantly mentally ill . . . ." "[T]hey are disturbed, schizophrenics, manic depressives who are not taking medication and are usually in a psychiatric hospital." (*Id.* at 108). "But clearly, Mr.

Lieberman is not mentally ill. He does not suffer from any of the . . . [psychiatric diagnoses] . . . which would lend themselves to . . . that determination." (*Id.* at 109). "All of his behavior over the past well–documented 26 years screams he has volitional control, volitional capacity. There is no doubt about that." (*Id.* at 109–10). Again, she testified: "Q. He has volitional capacity? A. Yes, and control. Q. And control? A. To do what he wants." (*Id.* at 110).

Dr. Buck could not measure Petitioner's level of volitional control or capacity, but she had no doubt he presently possesses full control and capacity. (*Id.* at 107–08). In her opinion, behavior is the only way to judge volitional control. Petitioner's past and present behavior is completely consistent with full volitional control. (*Id.* at 108–09).

The State's other expert witness, Dr. Barry Leavitt, did not contradict Dr. Buck on the issue of volitional control, nor did he provide any additional information about it. (Tr. Vol. 16 at 17–18; Tr. Vol. 7 at 102–10). He agreed that "under certain circumstances . . . [Petitioner] is capable of controlling his behavior." (Tr. Vol. 16 at 18). Dr. Leavitt offered the bare conclusion that Petitioner's mental disorders "affect" volitional control: "Q. ... [D]oes his mental disorder affect his emotional or volitional control? A. Clearly it does." (*Id.* at 19). Like Dr. Buck, Dr. Leavitt never testified that Petitioner lacked control or that he had any serious difficulty in controlling his behavior. He admitted that: "[I]n most situations in the last 26 years he's able to control his impulses." (*Id.* at 18–19; Tr. Vol. 9 at 174). "Q. He's able to control his impulses? A. That is correct." (Tr. Vol. 9 at 175).

## FEDERAL QUESTION RAISED BELOW

The federal question presented is whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and the Supreme Court decisions in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997), and *Kansas* v. *Crane*, 534 U.S. 407 (2002), permit post–incarceration civil commitment of a convicted sex offender when the uncontroverted evidence in the record shows that Petitioner does not currently lack volitional control over his behavior.

This federal question was first presented to the Circuit Court of Cook County in Petitioner's motion for directed verdict on February 7, 2006. Motion for Directed Verdict, 3–5. There, Petitioner argued that he could not be civilly detained absent a finding of lack of volitional control in light of U.S. Supreme Court precedent. *Ibid.* The trial court judge orally denied Petitioner's motion. App. 51a–52a. Petitioner again raised this federal question to the circuit court in his post–trial motion on April 7, 2006. Post–Trial Motion, 3, 6–7. The motion was denied without comment on April 10, 2006. App. 49a–50a.

On appeal, Petitioner presented this federal question to the Appellate Court of Illinois, First District, in his brief filed November 21, 2006. App. 103a–108a. Petitioner argued that, according to the Supreme Court decisions in *Hendricks* and *Crane*, due process requires "proof of serious difficulty in controlling behavior." *Ibid.* The federal question was also raised in Petitioner's reply brief. Reply Brief 1–2. The Appellate Court did not address the federal question in its published opinion, issued September 28, 2007. App. 1a–44a. Petitioner filed a petition for rehearing on October 19, 2007, which was denied on March 20, 2008. App. 47a–48a.

The federal question was raised in the Supreme Court of Illinois in a petition for leave to appeal filed on April 22, 2008. App. 98a–102a. Petitioner argued that the Due Process Clause of the United States Constitution does not permit commitment where the uncontroverted evidence in the record shows that Petitioner does not currently lack volitional control over his behavior. *Ibid.* The Supreme Court of Illinois denied the petition for leave to appeal without comment on September 24, 2008. App. 46a.

## REASONS FOR GRANTING THE PETITION

Two recent trends have undercut the importance of due process safeguards in state civil commitment proceedings, necessitating this Court's review of Petitioner's case. First, public awareness of these emotionally charged cases is on the rise, leading to political and popular pressure to commit *all* convicted sex offenders after they serve their prison sentences. And second, courts construing state statutes in light of *Hendricks* and *Crane* have subordinated the constitutional requirements announced in those cases to imprecise statutory language that often misses the constitutional mark.

Petitioner's case is emblematic of both trends. The decision below shows the ease with which prosecutors and courts can casually ignore controlling federal precedent in their zealous efforts to continue the confinement of convicted sex offenders after their prison sentences have been served. This case presents the Court with the opportunity to clarify once again that even the unpopular among us have constitutional rights, and those rights must be respected in civil commitment proceedings.

## I. Civil Commitment Statutes Have Become A Form Of Vigilante Justice, Fueled By A Popular Perception That Criminal Punishment Of Sex Offenders Is Not Sufficient.

Vigilante justice is typified by a disregard for due process in the face of a perception that criminal punishment is insufficient to punish a crime. Since the *Hendricks* decision in 1997 and the *Crane* decision in 2002, prosecutors in many states have acted like vigilance committees to enforce nominally civil commitment statutes that permit indefinite post–prison confinement of convicted sex offenders. The New York Times reported that, as of March 2007, approximately 2700 convicted sex offenders were being held well past their prison terms under civil commitment programs in 19 states. *See* Monica Davey and Abby Goodnough, *Doubts Rise As States Hold Sex Offenders After Prison,* N.Y. TIMES, March 4, 2007 *available at* http://www.nytimes.com/2007/03/04/us/04civil.html. Few of the committed sex offenders have been released. *Ibid.* The *Times* reporters commented that the laws are "proven and potent vote–getters that have withstood constitutional challenges." *Ibid.* They described the commitment trials as "contentious duels between psychologists over how best to analyze an offender's history and likelihood of repeating crimes." *Ibid.* They further noted that politics and emotion weigh heavily in the outcome of the cases, with elected judges and juries inescapably affected by the "raw facts of someone's offense history or the public spectacle over their crimes." *Ibid.*

The Illinois Attorney General has filed 422 cases under the Illinois SVPCA since the law took effect in

1998. *See* Mary Schenk, *Price of Justice High In Determining Sexually Violent Offenders*, THE NEWS–GAZETTE, December 14, 2008 *available at* http://www.news-gazette.com/news/2008/12/14/price_of_justice_high_in_determining_sexually_violent_offenders (reciting Illinois Attorney General statistics). To date, 230 respondents have been committed in Illinois, and another 151 are awaiting trial. Only 22 cases have been dismissed; 19 respondents have been conditionally released.

These statistics demonstrate the increasing public and judicial reliance on civil commitment statutes to keep sex offenders confined indefinitely. The juries to whom the commitment decisions are entrusted cannot—and are not instructed to—separate civil commitment issues from constitutionally improper punishment for past crimes. Further, ambiguous and vague psychological jargon compounds the difficulty for each court or jury, preventing them from making a meaningful distinction between the "dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment [and] the dangerous but typical recidivist convicted in an ordinary criminal case." *Crane*, 534 U.S. at 413.

In sum, the constitutional analysis required by *Hendricks* and *Crane* has become mired in a mix of politics, emotion, confusing expert testimony, and painstaking repetition of the details of past crimes. The new popularity of commitment statutes makes it all the more important that they be enforced with genuine concern for the fundamental principles of due process upon which their existence depends. U.S. CONST. amend. XIV §1. Accordingly, review by this Court is urgently needed now.

## II. Poorly Drafted State Statutes Have Further Diluted Principles Of Due Process.

The second trend that has undercut the constitutional requirements for civil commitment of convicted sex offenders results from the need for state courts to construe statutes that were enacted before *Crane*. In many cases, the issue has been presented, as it was in *State* v. *White*, 29 Fla. L. Weekly S821, 891 So. 2d 502, 503 (Fla. 2004), as follows: "Whether [*Crane*] imposed an additional, extra statutory but constitutionally required element necessary to commit a respondent . . . about which the jury must be instructed: namely, that the respondent has serious difficulty controlling behavior."

In *White*, the Florida Supreme Court held that *Crane* did not impose an additional requirement. The court noted that the Florida statute "did not state the standard in terms of whether respondent has serious difficulty controlling behavior, [but] it accomplishes the same result." *Id.* at 509. The court went on to predict that a respondent who fits the statutory description "necessarily will have difficulty controlling his behavior." *Id.* at 510.

That same logic—the assumption that when the state statute is narrowly tailored, the constitutional requirements of *Hendricks* and *Crane* will "necessarily" be met—has been followed by numerous courts, with the nearly unanimous result that the commitment order is upheld. *See In re Commitment of Burgess*, 262 Wis. 2d 354, 376–77, 665 N.W.2d 124, 135 (Wis. 2003) (expert's prediction that respondent could, but would not, control his behavior was sufficient proof under state statutory

language); *In re Detention of Thorell*, 149 Wash. 2d 724, 736, 72 P.3d 708, 715–16 (Wash. 2003) (statute requires "some proof" that the "mental abnormality has an impact on offenders' ability to control their behavior"; proof of a "link" between a mental abnormality and past sexually predatory behavior is sufficient); *In re Leon G.*, 204 Ariz. 15, 22, 59 P.3d 779, 786 (Ariz. 2002) (statute "substantially and adequately narrow[ed] the class of individuals subject to involuntary civil commitment"); *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 143, 568 S.E.2d 338 (S.C. 2002) (court may make a lack of control determination from the totality of the evidence). The Illinois statute itself was upheld by *In re Detention of Varner*, 207 Ill. 2d 425, 800 N.E.2d 794 (Ill. 2003)—which the appellate court cited in this case in one of its only references to constitutional limitations. The *Varner* court upheld the facial validity of the SVPCA based on its conclusion that the Act's definitions "supply the constitutionally required elements for civil commitment, . . ." App. 27a (quoting *Varner*, 207 Ill. 2d at 432–33, 800 N.E.2d at 798–99).

While it may be possible—or even likely—that a commitment order under a narrowly tailored state statute will satisfy the constitutional requirements, focusing on the state statute by itself is not sufficient to ensure constitutional protections in every case. State courts must also be willing to consider the constitutional issues independently, determining whether the evidence in the record comports with the due process protections recognized in *Hendricks* and *Crane*. The instant case is but one egregious example of a commitment order for a former offender for whom *there is no proof at all* of a serious difficulty

with behavioral control. For this reason as well, Supreme Court review is warranted.

## CONCLUSION

By ignoring *Hendricks* and *Crane* entirely and treating the issue as one of state law, the Illinois appellate court invites other courts to eliminate the federal constitutional requirement that convicted offenders must be proven by substantial evidence to have serious difficulty controlling their behavior before civil commitment can be ordered. This case thus exemplifies the emerging conflict between how commitment proceeding work in practice and how they should work under *Hendricks, Crane* and the Fourteenth Amendment. For all of these reasons, this Court should grant the Petition and reaffirm or clarify the constitutional requirements for civil commitment.

Respectfully submitted.

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DECEMBER 2008

# APPENDIX A

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Notice
The text of this opinion may be changed or corrected prior to the time of filing for a Petition for Rehearing or the disposition of the same.

**CORRECTED COPY 216**

Sixth Division
September 28, 2007

No. 1-06-1272

| | | |
|---|---|---|
| *In re* DETENTION OF Brad LIEBERMAN | ) | Appeal from |
| | ) | the Circuit Court |
| (The People of the | ) | of Cook County |
| State of Illinois | ) | |
| Petitioner-Appellee, | ) | |
| | ) | |
| v. | ) | 00 CR 8000101 |
| | ) | |
| Brad Lieberman, | ) | |
| Respondent-Appellant). | ) | Honorable Dennis J. Porter, Judge Presiding |

PRESIDING JUSTICE McBRIDE delivered the opinion of the court:

In 2006, a jury found respondent, Brad Lieberman, to be a sexually violent person under the Sexually Violent Persons Commitment Act (Act) (725

ILCS 207/1 *et seq.* (West 1998)). Following a subsequent dispositional hearing, the trial court ordered respondent committed to the Illinois Department of Human Services (DHS) for institutional care in a secure facility. Respondent appeals, arguing that: (1) he is entitled to judgment notwithstanding the verdict; (2) the trial court abused its discretion by admitting evidence of the details of his past crimes; (3) the court erred by excluding expert testimony; (4) the court abused its discretion by denying his motion for a new trial; (5) the court abused its discretion by ordering him confined for institutional care in a secure facility; and (6) the court erred in denying his renewed motion to dismiss based upon his corrected release date.

In 1980, respondent was convicted in the circuit court of Cook County of six counts of rape (Ill. Rev. Stat. 1981, ch. 38, par. 11-1)) and one count of attempted rape. That same year, respondent was found guilty of one count of rape and one count of attempted rape in Lake County. Respondent was sentenced to a number of concurrent terms of imprisonment, the longest of which required him to serve 40 years in prison.

Following numerous appeals on matters unrelated to the issues raised in this case, respondent was scheduled to be released from the Illinois Department of Corrections (DOC) on January 9, 2000. The present action began on January 6, 2000, when the State filed a petition pursuant to the Act seeking to have respondent adjudicated a sexually violent person and committed to the care and custody of the DHS. The petition alleged that respondent had been convicted of a number of sexually violent offenses and was dangerous to others because his mental disorders

created a substantial probability that he would engage in future acts of sexual violence. On February 10, 2005, following a hearing, the trial court found that there was probable cause to conduct further proceedings on the State's petition and ordered that respondent be detained at a facility approved by the DHS until trial.

At respondent's trial, the State presented the testimony of two expert witnesses: Dr. Jacqueline Buck and Dr. Barry Leavitt. Dr. Buck is a clinical psychologist and special evaluator for the DOC. Dr. Buck testified that she conducted one two-hour interview with respondent in October 1999 and reviewed his master file as well as numerous other documents. Her review included psychological and psychiatric evaluations of respondent, police reports, and other court documents provided by the DOC detailing the events that led to respondent's various convictions. Based upon her review and evaluation, Dr. Buck believed that respondent was at a high risk to sexually reoffend if he was released into the community without treatment and, in October 1999, she prepared a report to that effect. Dr. Buck updated her opinion every year thereafter and, although she did not conduct any additional interviews of respondent because he refused to speak with her, Dr. Buck did not believe that an additional interview was warranted because respondent refused to participate in sexual offender treatment. Accordingly, Dr. Buck's opinion had not changed since she prepared her initial 1999 report and she believed that respondent continued to be at a high risk to sexually reoffend.

Dr. Buck testified that, in forming her opinions, she relied upon respondent's criminal history and the facts from cases in which he was convicted of rape

and cases in which he was arrested and charged with a sexually related offense. According to Dr. Buck, respondent refused to discuss these crimes with her and characterized them as "just being in the wrong place at the wrong time," "overzealous police officers," and "mistaken identity." Over respondent's objection, the trial court allowed Dr. Buck to describe the facts from the cases that she relied upon in forming her opinion. For example, Dr. Buck testified that respondent gained entry into the victim's home by stating that he was a plumber and that the building's management had sent him to check on leaks. Once inside, respondent moved to the victim's bedroom and asked her to remove items from the closet. When the victim was facing away from him, respondent grabbed her around the throat, held a knife to her throat and threatened to hurt her if she did not comply. Respondent then put the victim on the bed and forced her to perform various sexual acts. Dr. Buck testified in a similar manner as to the facts from respondent's other rape convictions and from cases in which respondent was arrested and charged with a sexual offense. The trial court instructed the jury that this testimony was being offered to show the basis of Dr. Buck's opinions and not to prove the truth of the matters asserted.

In arriving at her opinions, Dr. Buck also considered evidence of respondent's behavior while he was incarcerated in the DOC and in the custody of the DHS. This evidence established that, while in the DOC, respondent told the staff that he was not an inmate because he did not commit the offenses for which he was convicted. During that time, respondent was also found with cannabis, tested positive for morphine, and disciplined five times for

drugs or drug paraphernalia. Respondent also received disciplinary reports for his conduct, was placed in segregation numerous times, and engaged in acts of intimidation, threats and other rule violations. Respondent had his visiting privileges revoked after demonstrating inappropriate behavior with a female in the visitor's room and received a disciplinary report after he was found in the visitor's bathroom engaged in sexual activity with a woman. While in the custody of the DHS, respondent exhibited "angry, hostile, aggressive behaviors" on many instances and insisted that he was being illegally detained.

Dr. Buck also reviewed correspondence that respondent wrote to eight women over a period of approximately 10 months while he was incarcerated. On one occasion, respondent wrote to a woman he saw on television in an attempt to begin a friendship with her. In that letter, respondent enclosed a picture of himself and indicated that he was lonely and that he was in prison because he beat up a man who had beaten up his sister. On another occasion, respondent wrote to a women whose picture he had seen in the newspaper, stating "how beautiful she was," "how sweet and how hot," and "how lucky he would be to have a friend like her." In another instance, respondent used "a lot of profanity" in a letter he wrote to a woman whom he was upset with for not attending a prison picnic. Although she acknowledged that many inmates correspond with women outside the prison, Dr. Buck noted that almost all of these women had objected to the letters that respondent sent them. Dr. Buck also acknowledged that respondent only wrote letters to one woman after he was told to stop by the prison staff.

Based upon all of these considerations, Dr. Buck diagnosed respondent with paraphilia not otherwise specified, sexually attracted to nonconsenting persons (paraphilia NOS). Dr. Buck described the group of paraphilia disorders, which are contained in the Diagnostic and Statistical Manual of Mental Disorders (DSM), as essentially "sexually deviant behaviors," and testified that in this case, "we have what the law calls rape behavior, sexual assaults with nonconsenting women." Dr. Buck testified that the first criterion for paraphilia is that there be "intense recurring sexually arousing urges, fantasies or thoughts or behaviors which occur over at least a 6 month period of time," and that respondent met this criterion based on his multiple rapes committed over a 10-month period. The second criterion for paraphilia NOS is that these behaviors cause distress or impair respondent's ability to function socially in the workplace or society. Respondent's detention in the DOC and DHS met this criterion, and Dr. Buck testified that respondent is "not able to be in society and function the way other folks do." The final criterion is that respondent must be at least 16 years old at the time of the diagnosis. Respondent met this criterion based on his age at the time of trial.

Dr. Buck explained that respondent suffers from paraphilia notwithstanding that he has not committed any rapes since he was incarcerated in 1980. According to Dr. Buck, respondent has been in a controlled environment in the DOC, which goes "out of [its] way" to protect its females workers. Respondent also continually crossed boundaries and exhibited inappropriate sexual behavior while incarcerated and in the custody of the DHS. Dr. Buck further explained that paraphilia NOS is a "very

deep-seeded problem" that requires intensive treatment and does not heal itself or go away while someone who suffers from it is in prison. Moreover, although the 15 mental health evaluations respondent underwent while incarcerated did not diagnose paraphilia, Dr. Buck was the first examiner to do a sex-offender-specific evaluation.

Dr. Buck also diagnosed respondent with cannabis abuse and antisocial and narcissistic personality disorders. Dr. Buck described antisocial personality disorder as "the disregard for and violation of the rights of others," and narcissistic personality disorder as someone who is "very grandiose" in thought or behavior, who requires admiration, and exhibits a lack of empathy.

Dr. Buck also conducted a risk assessment using four actuarial tools to determine respondent's risk of committing future acts of sexual violence. Specifically, Dr. Buck employed: (1) the Minnesota Sex Offender Screening Tool Revised (MnSOST-R); (2) the Static-99; (3) the Violence Risk Appraisal Guide (V-RAG); and (4) the Sex Offender Risk Appraisal Guide (SORAG). Respondent scored "very high" under the MnSOST-R, "extremely high" under the Static-99, "high" under the V-RAG, and "extremely high" under the SORAG.

Dr. Buck stated that she looked for mitigating factors to consider in reaching her opinions. According to Dr. Buck, the DHS offers a variety of activities in addition to the core sex offender program. These include ancillary groups, which focus on, among other things, anger management and intermittent relationship skills and substance abuse treatment, and recreation therapy programs, which

attempt to teach sex offenders alternative ways of recreating. Dr. Buck testified that respondent has refused to participate in any of these programs and that she was therefore unable to find any mitigating factors. Dr. Buck also considered respondent's age and testified that, because he scored as a psychopath, respondent did not exhibit the usual pattern of decreased crime corresponding to increased age.

Dr. Buck concluded that in her opinion, within a reasonable degree of psychological certainty, respondent suffers from mental disorders that are both congenital and acquired, affect his emotional and volitional capacity, and predispose him to commit future acts of sexual violence. Based upon her clinical evaluation, review of respondent's files, respondent's lack of sex offender treatment, and the actuarial instruments she employed, Dr. Buck opined that it is substantially probable that respondent will continue to commit acts of sexual violence if released into the community.

On cross-examination, Dr. Buck testified that the Association for Treatment of Sexual Abusers (ATSA) recommends the use of multiple sources of information when making evaluations such as those in this case. Dr. Buck was also not aware that several of respondent's convictions were overturned by the appellate court. Dr. Buck acknowledged that in her evaluation she did not rely upon a 1991 psychological examination of respondent conducted by Dr. Michael Guttman, whose examination of respondent revealed "no overt symptoms of gross psychopathology" and no diagnosis of paraphilia, cannabis abuse or narcissistic disorder. Dr. Buck also acknowledged that the inquiry board investigation into respondent's loss of visitation privileges with a woman due to

inappropriate behavior in the visitor's room indicated that respondent lost those privileges due to an incident between the woman and her ex-husband, and that the board recommended that respondent's visiting privileges with that woman be reinstated.

According to Dr. Buck, respondent took two Minnesota Multiphasic Personality Inventory tests while he was incarcerated. The psychologist who administered these tests diagnosed respondent with psychosexual disorder and mixed personality disorder with antisocial, narcissistic and dependent features. Dr. Buck acknowledged that the original version of the MMPI, which respondent took in 1986, is no longer recommended for clinical use and was revised because it exaggerated individuals' mental health problems and generally over-diagnosed people with psychological problems. Additionally, the psychologist who performed the MMPI tests did not diagnose respondent with paraphilia NOS or cannabis abuse.

According to Dr. Buck, respondent was evaluated by a psychologist and psychiatrist while incarcerated in 1989. The psychologist did not diagnose respondent with paraphilia, cannabis abuse, or narcissistic and antisocial personality disorders, although Dr. Buck testified that these diagnoses were appropriate for these evaluations. The psychiatrist who evaluated respondent concluded that he had no psychiatric history or acute psychiatric problems, and Dr. Buck explained that this diagnosis was consistent with her opinions because respondent is not mentally ill and therefore does not have acute psychiatric problems.

On cross-examination, Dr. Buck also testified that it was important for the results of actuarial

instruments to be replicated by other psychologists before they are relied upon to determine if someone should be civilly committed. Dr. Buck acknowledged that Dr. Karl Hanson prepared an article which Dr. Buck considered to be authoritative in the field of sexually-violent person evaluations indicating that the replication strength of the actuarial instruments upon which Dr. Buck relied was low and that one of those actuarial tools was not intended to assess the risk for sexual recidivism. Dr. Buck also acknowledged that according to Dr. Hanson's article, three of the four risk scales that she used on respondent do not predict the specific kind of recidivism that is at issue in this case and that, according to the American Psychological Association (APA), the ability to predict sexual recidivism is only a matter of general and uncertain probabilities.

Dr. Buck also used a personality inventory called the Hare Psychopathy Checklist - Revised (PCL-R) to assess respondent's risk to recidivate and to substantiate her diagnoses of antisocial and narcissistic personality disorders. She did not ask respondent all of the questions contained in the PCL-R interview schedule because those questions were required to be asked only if respondent took personal responsibility for his conduct. Dr. Buck did not recall reviewing a binder containing recommendation letters and affidavits regarding respondent from various state employees who have known him since 1980.

Dr. Buck testified under cross-examination that she made several errors in scoring respondent's actuarial results and that, according to Dr. Hanson, some of the risk factors upon which she relied could not be used to predict if a person will sexually

reoffend. Dr. Buck acknowledged that, according to a 2001 brief by the APA submitted in another case, substance abuse and personality disorders usually have little explanatory connection to an offender's sexual behavior. Moreover, according to Dr. Hanson, offenders who denied their offenses are at no higher risk to recidivate than are other sexual offenders.

Dr. Buck further testified that respondent was assigned a primary therapist when he was placed in a DHS treatment and detention facility in 2000. During that time, approximately 14 master treatment plans were prepared by respondent's primary therapist and other mental health staff. Dr. Buck acknowledged that 12 of those treatment plans did not diagnose respondent with narcissistic personality disorder, although they did indicate narcissistic features, and that 11 of those plans did not diagnose respondent with cannabis abuse. Dr. Buck also acknowledged that none of the 15 evaluations conducted while respondent was incarcerated diagnosed him with narcissistic personality disorder or cannabis abuse, but testified that those evaluations did not diagnose cannabis abuse because they were not "substance abuse focused."

Dr. Buck gave specific testimony on cross-examination regarding respondent's volitional control. Dr. Buck testified that professionals in her field do not measure volitional control as "high, low, up, [or] down," and explained that she was not aware of any way of measuring volitional capacity. Rather, according to Dr. Buck, respondent's mental disorders impact his emotional and volitional control by warping his perceptions and feelings, which allows him to exhibit sexually assaulting behavior. Dr. Buck testified that respondent has volitional control and

capacity to do what he wants because he is not mentally ill, and that those without volitional control are mentally ill and include schizophrenics and manic-depressives who are not taking medication and are usually in a psychiatric hospital. Dr. Buck further testified that respondent committed the crimes intentionally and made a volitional choice to execute them, and that "all of [respondent's] behavior over the past well documented 26 years screams that he has volitional control, volitional capacity."

Dr. Barry Leavitt is a clinical psychologist who specializes in sexually-violent-person evaluations. Because respondent refused to be clinically interviewed, Dr. Leavitt conducted his evaluation by reviewing respondent's master file. According to Leavitt, an examination based solely on a review of available records is an acceptable method of conducting a sexually-violent person evaluation.

Dr. Leavitt testified that, in his expert opinion, respondent suffers from: (1) paraphilia NOS; (2) antisocial personality disorder; (3) narcissistic personality disorder; and (4) cannabis abuse within a controlled environment. Dr. Leavitt explained that paraphilia was the primary predisposing condition that compelled respondent to commit sexually violent acts and that respondent's other disorders act as disinhibiting influences that make it easier for him to exhibit sexually violent behavior. Dr. Leavitt further testified that respondent's paraphilia is a congenital or acquired disorder that affects his volitional or emotional control and predisposes him to commit future acts of sexual violence. Dr. Leavitt explained that respondent's recurrent sexual behaviors were not simply impulse driven but, rather, highly planned and consistent with someone who is compelled to

engage in sexually deviant behavior. Moreover, paraphilia cannot be cured but it can be controlled through treatment. Dr. Leavitt opined that, in his expert opinion, there is a substantial probability that respondent will commit future acts of sexual violence unless he participates in appropriate treatment.

Dr. Leavitt explained how respondent's "sexual offending" formed his diagnosis of paraphilia. According to Dr. Leavitt, respondent qualified for a diagnosis of paraphilia nos, which requires a recurrent pattern of sexual urges, fantasies or behaviors toward nonconsenting persons over a period of at least six months, because he was identified by 16 women as having or attempting to have committed sexually violent offenses against them and approximately half of those cases resulted in convictions. Another criteria for paraphilia NOS involves these sexual behaviors leading to maladaptive social and occupational functioning, which was evidenced by respondent's significant period of incarceration. Paraphilia also requires that the sexual behavior have been committed over this length of period of time, which in this case was satisfied by respondent's sexual behavior toward nonconsenting females recurring over a 10-month period.

Dr. Leavitt used actuarial instruments to conduct a risk assessment and measure respondent's likelihood of reoffending. Respondent fell into the "high risk" category under both the Static 99 and the MnSOST-R actuarial tools. Both instruments are viewed as providing an underestimate of someone's future likelihood of reoffending. Respondent's results from these instruments served to confirm Dr. Leavitt's clinical judgment that it was substantially

probable that respondent would commit future acts of sexual violence were he released into the community.

Dr. Leavitt also looked at additional "dynamic risk factors" that might serve to solidify, modify or aggravate the level of risk as determined by the actuarial instruments and the clinical impressions. Factors that Dr. Leavitt found to be relevant to respondent included: (1) attitudes that support sexual offending, such as a sense of entitlement, lack of acknowledgment and remorse for acts of sexual violence; (2) "intimacy deficits" or the quality of respondent's relationships and ability to see women as something other than objects; (3) "emotional and sexual regulation deficits," such as respondent's lack of remorse or empathy for what he has done; (4) "self-management deficits," such as respondent's unwillingness to respect others' boundaries, as evidence by the unsolicited letters respondent wrote while incarcerated; (5) antisocial proclivities or psychopathy due to a combination of antisocial personality disorder and sexual deviant behavior; and (6) respondent's complete failure to participate in available treatment. Dr. Leavitt testified that based upon his clinical judgment and review of the actuarial result and risk factors, there is a high risk that respondent will sexually reoffend.

On cross-examination, Dr. Leavitt acknowledged that the ATSA advises psychologists to discuss the limits of any conclusions that are not based on a personal interview. However, Dr. Leavitt testified that he complied with that requirement by disclosing that respondent refused to be interviewed and that his report was based on a review of available records. Dr. Leavitt believed that this disclosure was

consistent with his responsibilities under the ATSA and the APA.

Dr. Leavitt also disagreed with a treatise indicating that paraphiliac fantasies and ritualized behavior need to be elicited in order to diagnose paraphilia, and believed that, instead, he needed evidence of sexually arousing fantasies, urges or sexual behaviors. Dr. Leavitt made the same scoring errors as did Dr. Buck in scoring respondent's actuarial results, but testified that these errors would not change any of his conclusions.

Respondent's first witness was Dr. Fred Berlin, a psychologist and medical doctor who specializes in sexual disorders. Dr. Berlin was called to testify regarding the third criterion for being found a sexually violent person under the Act, namely, whether actuarial tools can be helpful in determining if respondent's mental disorder makes him likely to commit future acts of sexual violence. Dr. Berlin explained that an actuarial method is "a statistical method for trying to identify a group of individuals that will contain within it a higher number of people who are at risk of a certain outcome." Dr. Berlin testified that actuarial instruments, while helpful in identifying and distinguishing between groups that are at a high and low risk of sexually reoffending, cannot accurately predict the likelihood that a particular individual will commit a future sexual offense. Dr. Berlin believed that clinical judgment was preferred over actuarial instruments because a clinician is more aware of the facts about a given individual. Dr. Berlin also characterized Dr. Buck's statements that the actuarial instruments placed respondent at an extremely high risk of sexually reoffending as misleading. Dr. Berlin acknowledged

that neither Dr. Leavitt nor Dr. Buck used actuarial tools alone in arriving at his and her opinion in this case.

Dr. Diane Lytton, a psychologist experienced in treating sex offenders, also testified for respondent. Dr. Lytton reviewed respondent's master file, Dr. Buck's and Dr. Leavitt's reports, and Dr. Buck's deposition and trial testimony in this case. Dr. Lytton also interviewed respondent on three occasions for approximately 12 hours in July 2005 and interviewed several of his family members.

Dr. Lytton disagreed with the diagnoses of the State's experts and testified that, in her expert opinion, respondent does not suffer from a mental disorder that affects his emotional and volitional control and predisposes him to commit acts of sexual violence, and that it was not substantially probable that respondent would commit a sexually violent offense in the future. Dr. Lytton opined that respondent did not have a mental disorder because his sexual offenses occurred 26 years ago, the majority of those who commit rape do not have mental disorders, and respondent does not currently have recurrent intense sexually arousing fantasies, urges or behaviors that would support a diagnosis of paraphilia. Dr. Lytton gave considerable weight to respondent's family and social upbringing in arriving at his opinion and explained that respondent was close to his family, that he had been married and remained close to his ex-wife, that he held numerous jobs growing up, and that he was very active in athletics and music. This showed Dr. Lytton that respondent was very engaged with others socially, although she acknowledged that a person with antisocial and narcissistic personality disorders

might also participate in these activities. According to respondent's family, he was considerate, honest, and never violent or aggressive. Dr. Lytton also reviewed the 15 mental health evaluations compiled while respondent was incarcerated and opined that those evaluations, which did not diagnose paraphilia, narcissistic personality disorder or cannabis abuse, were inconsistent with the four disorders diagnosed by Dr. Buck and Dr. Leavitt.

Dr. Lytton also relied upon respondent's behavior while in prison in arriving at her opinions in this case. She gave little weight to respondent's marijuana use and noted that, while incarcerated, respondent obtained his GED, received letters of recommendation for good behavior, and was allowed to travel to coed correctional centers for prison band performances. Respondent underreported these activities during his evaluation, which Dr. Lytton found to be inconsistent with the personality disorders diagnosed by the State's expert witnesses. Dr. Lytton testified that even though respondent was in a secure facility, it was nevertheless significant that he was allowed to be around women because sexual assaults can and do occur in a prison environment.

Dr. Lytton also reviewed approximately 33 letters of recommendation from prison guards, officers and wardens. Examples of good behavior that were cited in these letters included intervening on behalf of an injured guard, coming to the aid of a severely beaten inmate and returning prison keys to the staff. Dr. Lytton's review of these letters indicated that respondent followed most of the rules while incarcerated, that he was not aggressive, did not have anger control issues, was able to show empathy, and

was a psychologically stable person. Dr. Lytton found it insignificant that respondent had refused treatment because doing so would be against his legal interests and testified that the State's experts' emphasis on respondent's refusal to undergo treatment was "real close to an ethical issue."

Dr. Lytton also explored respondent's attitudes toward women by interviewing him and reviewing his relations with his former wife and current fiancée and the unsolicited letters he sent to women while he was incarcerated. Dr. Lytton believed that it was important to know whether respondent has sexual fantasies or urges and, if so, to what extent they permeated his mental life. Dr. Lytton concluded that respondent did not have sexually deviant fantasies or urges and gave no indication of sexually deviant behavior.

Dr. Lytton also testified that respondent did not suffer from cannabis abuse because he freely admitted being caught with marijuana in prison, his last positive drug test occurred in 1998, and his reported five instances of marijuana use while in prison were insufficient to support a diagnoses of cannabis abuse. Dr. Lytton testified that respondent did not have narcissistic personality disorder and found that he was able to empathize with and demonstrate concern and care for others. Finally, Dr. Lytton opined that respondent did not have antisocial personality disorder, and found him to be revealing and willing to admit to his misconduct while in prison.

Dr. Lytton further testified that, in her expert opinion, respondent's behavior demonstrated that he had volitional control. For example, respondent was

given jobs while in prison that required him to work in secure areas and his sexual offenses were well planned out. In Dr. Lytton's expert opinion, respondent was not substantially probable to commit a future act of sexual violence. Contrary to a common misconception, most sexual offenders do not reoffend and government studies indicate that sexual offenders as a group recidivate at a lesser rate than other criminals. Dr. Lytton testified that actuarial instruments were inappropriate to predict the risk that a person will sexually reoffend and that they do not account for the most dynamic risk factor - a person's age. High risk sexual offenders recidivate at a lesser rate as they get older and, in respondent's case, his age equated to a low risk of recidivism. Dr. Lytton explained that she relied upon two risk assessment instruments in concluding that respondent was not substantially probable to reoffend: the MnSOST-R and the PCL-R. Dr. Lytton reviewed Dr. Buck and Dr. Leavitt's MnSOST-R score for respondent and found the results and the opinions derived therefrom erroneous. She testified that, in scoring respondent's MnSOST-R results, Dr. Leavitt improperly relied upon the letters that respondent wrote while incarcerated and that the proper scoring guidelines were meant to capture offenses that were or could have been actually prosecuted. Dr. Lytton discounted the unsolicited letters written by respondent as mutual and consensual attempts to "strike up relationships with women," which she believed was normal under the circumstances, and noted that respondent ceased writing letters after being told that it was inappropriate. According to Dr. Lytton, the risk factors that Dr. Buck relied upon were either unsupported by research or not effective in predicting risk of sexual reoffending. For example,

Dr. Lytton did not believe that respondent's denial of his sexual offenses was an appropriate risk factor. Based on Dr. Lytton's analysis of those risk factors, including respondent's age and the low base rate of recidivism for sexual offenders, she concluded that respondent was not substantially likely to commit a future act of sexual violence.

On cross-examination, Dr. Lytton testified that in arriving at her opinions in this case, she considered the details of respondent's past crimes. Over respondent's objection, the State reviewed the details of those offenses with Dr. Lytton, and Dr. Lytton acknowledged that those acts constituted sexual behavior with a nonconsenting person and that, in committing them, respondent demonstrated a lack of empathy toward his victims, a pervasive pattern of violating laws, and an inability to conform to social norms.

Dr. Lytton acknowledged that 11 master treatment plans prepared since respondent was detained in a DHS treatment and detention facility in 2000 reflect a diagnosis of paraphilia nos. Those treatment plans began in January 2000 and continued intermittently through June 2005. Dr. Lytton testified that she did not know who made those diagnoses, but that Dr. Buck's name did not appear in those reports and that Dr. Buck did not sign them. Dr. Leavitt also testified that the diagnoses in those plans were made after Dr. Buck's initial evaluation of respondent in 1999 and that they did not appear prior to that evaluation.

Dr. Michael Fogel is a licensed clinical psychologist who was the director of the Illinois Sex Offender Evaluation Unit from May 2003 to

December 2005. In Dr. Fogel's opinion, actuarial instruments should not be used to evaluate sex offenders under the Act.

Finally, respondent called several other witnesses whose testimony established that respondent had contact with females during his incarceration that did not produce any incidents.

On February 6, 2006, the jury found respondent to be a sexually violent person under the Act. The case then proceeded to a dispositional hearing, at which time the trial court considered the evidence adduced at trial as well as affidavits and an oral statement from respondent. The court noted that respondent was convicted of multiple sexual attacks on numerous women, which were the "most invasive" crimes aside from murder, that the jury found that respondent suffered from a mental disorder, and that, while respondent had arranged employment as a law clerk and to live with his fiancée, he also had refused to undergo treatment or acknowledge his past criminal offenses. Based upon these considerations, the court ordered respondent committed to the DHS for institutional care in a secure facility until further order of the court. This appeal followed.

Respondent first contends that he is entitled to judgment notwithstanding the verdict. Specifically, he contends that the evidence was insufficient because: (1) the State failed to prove that he suffers from a serious lack of volitional control resulting from a current mental disorder; (2) the State failed to prove beyond a reasonable doubt that he currently suffers from a mental disorder or that he presents any risk to reoffend; and (3) the State failed to prove

any facts other than the convictions themselves to support the judgment.

The Act defines a sexually violent person as an individual who "has been convicted of a sexually violent offense *** and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 1998). The State must prove the allegations in its petition beyond a reasonable doubt. 725 ILCS 207/35(d)(1) (West 1998). On review, we ask only whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the elements proved beyond a reasonable doubt. *In re Detention of Tittlebach*, 324 Ill. App. 3d 6,11 (2001).

Respondent first claims that the State failed to prove beyond a reasonable doubt that he has serious difficulty controlling his sexual behavior. Respondent's argument is primarily based on Dr. Buck's testimony that respondent is not mentally ill and that he committed his sexual offenses intentionally and with volition. Respondent essentially argues that, based upon this testimony, the State did not prove that he lacked the ability to control his sexually violent behavior. We disagree.

In resolving respondent's contention, we find instructive the decision in *In re Detention of Traynoff*, 358 Ill. App. 3d 430 (2005). In *Traynoff*, 358 Ill. App. 3d at 439, the court considered a similar claim that, based on the testimony of the State's experts that the respondent committed his sexual offenses with volition, the State had failed to prove that he lacked control over his sexually violent behavior. In rejecting

that claim, the court noted that the State's experts testified that the respondent suffered from paraphilia nos, alcohol abuse, and severe antisocial disorder, that he had failed to accept blame or show remorse for his criminal conduct and instead transferred blame to others, and that the respondent was dangerous because his mental disorders created a substantial probability that he would engage in future acts of sexual violence. *Traynoff,* 358 Ill. App. 3d at 439-40. The court found that this was sufficient evidence to sustain the trial court's determination that the respondent lacked control of his sexually violent behavior, and proceeded to note:

> "[T]estimony that respondent committed these acts of sexual violence with volition does not prevent commitment under the Act.
>
> If we were to adopt such a position, all persons subject to commitment would escape such a finding by declaring all of their past criminal conduct to be volitional. Under that view, commitment would result only when a person confessed to an inability to control his sexually violent behavior ***. * * * [T]he Constitution's safeguards of human liberty in the area of mental illness and the law are not best enforced through precise, bright-line rules." *Traynoff,* 358 Ill. App. 3d at 440.

Similarly, in this case, we find that there was sufficient evidence presented to establish that respondent has serious difficulty controlling his

sexually violent behavior. We initially note that although the jury is not required to make an explicit finding that respondent has serious difficulty controlling his sexual behavior (*In re Detention of Varner*, 207 Ill. 2d 425, 432-33 (2003)), such a finding is implicit in the jury's verdict in this case that respondent is a sexually violent person. This court has noted that "the Act contains a volitional component in (1) its definition of 'mental disorder' as 'a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence' (725 ILCS 207/5(b) (West 2000)); and (2) its required finding that it is 'substantially probable' that the respondent will engage in future acts of sexual violence." *In re Commitment of Stevens*, 345 Ill. App. 3d 1050, 1062 (2004). Based upon these volitional components, this court has also held that, in finding that someone is dangerous because he suffers from a mental disorder that makes it substantially probable that he will engage in future acts of sexual violence, the jury is necessarily required to find that the person lacks volitional control over his mental disorder. *See, e.g., In re Detention of Trevino*, 317 Ill. App. 3d 324, 335-36 (2000); *Tittlebach*, 324 Ill. App. 3d at 14.

We also find that there was sufficient evidence presented at trial to support a finding that respondent lacks volitional control over his mental disorders. Initially, Dr. Leavitt's testimony alone was sufficient to support this conclusion. Dr. Leavitt diagnosed respondent with paraphilia nos, cannabis abuse, and antisocial and narcissistic personality disorders. Dr. Leavitt testified that respondent's paraphilia affects his emotional and volitional capacity and predisposes him to commit future acts of

sexual violence, and explained that respondent's other disorders act as disinhibiting influences that make it easier for him to commit sexually violent acts. According to Dr. Leavitt, respondent has refused to undergo treatment for his paraphilia, which is the only way to control that disorder, and shows a lack of empathy for his victims and a lack of remorse for his actions. In addition to his clinical judgment, Dr. Leavitt used actuarial instruments to confirm his opinion that respondent's mental disorders create a substantial probability that he will engage in future acts of sexual violence. Considering all of this testimony, we find that a jury could reasonably conclude that respondent has serious difficulty controlling his sexually violent behavior.

Dr. Buck's testimony also supports a finding that respondent has serious difficulty controlling his sexual behavior. Dr. Buck found that respondent suffers from the same disorders as were diagnosed by Dr. Leavitt, and she testified that those disorders impact respondent's emotional and volitional capacity and predispose him to commit future acts of sexual violence. Dr. Buck also noted that respondent has refused to undergo treatment for his disorders and that he lacks empathy for his victims. She added that respondent has refused to accept responsibility for his criminal offenses and that he blames his convictions on overzealous prosecutors and mistaken identity. Dr. Buck concluded that respondent's mental disorders make it substantially probable that he will commit future acts of sexual violence. Although Dr. Buck testified that respondent has volitional control, the jury was free to accept or reject as much or as little of her testimony as it saw fit. *See People v. McDonald*, 329 Ill. App. 3d 938, 947 (2002) (jury is

free to accept the opinion of one expert witness over another or accept part and reject part of each expert's testimony); *People v. Cosime*, 247 Ill. App. 3d 420, 428 (1993) (trier of fact is free to accept or reject all or part of a witness' testimony).

Moreover, Dr. Buck's testimony that respondent made a volitional choice to commit his sexual offenses does not preclude his commitment under the Act. *See Traynoff*, 358 Ill. App. 3d at 441. Dr. Buck testified that respondent is "free to do what he wants," in that he committed his sexual offenses intentionally and made a volitional choice to execute them. Respondent seems to interpret this testimony to mean that he is able to control his sexually violent behavior and that, in effect, he could make a volitional choice to never again commit a sexually violent offense. However, such a conclusion does not follow from Dr. Buck's testimony. The mere fact that respondent intentionally committed his sexual offenses does not mean that he has the volitional capacity to choose not to commit them. Dr. Buck never offered such an opinion and in fact testified that there is a substantial probability that respondent will commit a future act of sexual violence. In this regard, Dr. Buck explained that respondent's mental disorders "warp his perceptions and his feeling and allow him to exhibit sexually assaulting behavior." Dr. Buck further explained that she was not aware of a means of measuring volitional capacity and that psychologists do not measure volitional control as "high, low, up, [or] down." Rather, in Dr. Buck's expert opinion, respondent's mental disorders impact his emotional and volitional capacity and predispose him to commit acts of sexual violence. We conclude that Dr. Buck's statements regarding respondent's

volitional control, when considered in context of her entire testimony, do not undermine the jury's verdict that respondent is a sexually violent person. *See Varner*, 207 Ill. 2d at 432-33 (rejecting a claim that the constitution required a specific determination by the fact finder that a person lacks volitional control and concluding that the Act "contain[s] definitions that supply the constitutionally required elements for civil commitment," and "[a] fact finder properly instructed with definitions of these and other pertinent statutory terms need not receive additional separate instruction on lack of control").

We disagree with respondent that Dr. Leavitt concurred with Dr. Buck's testimony that respondent has volitional control. Respondent's claim is based on Dr. Leavitt's testimony that, by not sexually assaulting anyone while in prison, respondent demonstrated that he could control his behavior under certain circumstances. However, Dr. Leavitt further explained that it was important to consider that respondent was incarcerated within a correctional facility during this time. Dr. Buck similarly noted that the DOC is a "controlled environment" that goes "out of [its] way" to protect its female workers. Under these circumstances, we do not read Dr. Leavitt's testimony to indicate that respondent has volitional control over his mental disorders or his sexually violent behavior.

Respondent also claims that the State failed to prove beyond a reasonable doubt that he suffers from a mental disorder and that he is dangerous because that disorder creates a substantial probability that he will engage in future acts of sexual violence. Respondent asserts that the testimony of the State's experts was inconsistent and unsupported by

admissible evidence, and therefore insufficient to sustain the jury's verdict. We disagree.

The Act defines a mental disorder as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." 725 ILCS 207/5(b) (West 1998). In this case, Dr. Buck and Dr. Leavitt testified that respondent suffers from paraphilia nos, a congenital or acquired disorder that affects his emotional or volitional capacity and predisposes him to commit future acts of sexual violence. Dr. Buck and Dr. Leavitt also diagnosed respondent with cannabis abuse and narcissistic and antisocial personality disorders. Both witnesses concluded that respondent's mental disorders create a substantial probability that he will engage in future acts of sexual violence. We conclude that this testimony was sufficient to support the jury's finding that respondent suffers from a mental disorder and that he is dangerous because that disorder creates a substantial probability that he will engage in future acts of sexual violence. *See Tittlebach*, 324 Ill. App. 3d at 11-12 (expert testimony that the respondent had a mental disorder, pedophilia, that made it substantially probable that he would commit sexually violent acts in the future was sufficient to prove beyond a reasonable doubt that the respondent was a sexually violent person); *Stevens*, 345 Ill. App. 3d at 1061 (expert testimony that the respondent's mental disorders, including paraphilia, antisocial personality disorder, and substance dependency, caused him to be more likely to reoffend sufficient to support that the jury's finding that the respondent's mental disorders made it substantially probable that he would engage in future acts of sexual violence).

Respondent nevertheless argues that the testimony of the State's experts is entitled to no weight and should be disregarded because: (1) their opinions and diagnoses did not meet the diagnostic criteria of the DSM; (2) they relied solely upon his past crimes to diagnose him with paraphilia; (3) they relied upon anecdotal information about his behavior while incarcerated and ignored affirmative evidence about his normal functioning in prison; (4) they claimed that respondent's current confinement satisfied the DSM's requirement for a paraphilia diagnosis of current distress or disability; and (5) Dr. Buck rejected the DSM requirement of a pervasive pattern of conduct and recurrent presentation of symptoms and admitted that respondent is not mentally ill, that she was unaware that he has any recurrent, intense sexually arousing fantasies or sexual urges, and that he has not engaged in nonconsensual sexual activity in 26 years. Respondent further argues that reasonable doubt was created because the State's experts relied solely upon actuarial instruments to conclude that there was a substantial probability that he would engage in future acts of sexual violence.

We find that respondent's claims amount to no more than an attack on the credibility of the witnesses and the weight to be given to their testimony. In considering a challenge to the sufficiency of the evidence, it is not the function of this court to reweigh the evidence or retry respondent. *In re Detention of Erbe*, 344 Ill. App. 3d 350, 373 (2003); *Tittlebach*, 324 Ill. App. 3d at 11. Rather, the trier of fact, in this case the jury, is responsible for assessing the witnesses' credibility, weighing the testimony, and drawing reasonable

inferences from the evidence. *Tittlebach*, 324 Ill. App. 3d at 11. In this case, the record establishes that, at trial, respondent explored all of the alleged inadequacies in Dr. Buck's and Dr. Leavitt's opinions during a vigorous cross-examination of both witnesses and through the testimony of his own expert witnesses. *See Erbe* 344 Ill. App. 3d at 372 (noting that traditional methods, such as cross-examination and rebuttal witnesses, offered respondent the opportunity to challenge the State's experts' opinions in the proper forum - during trial in front of the jury). In finding respondent to be a sexually violent person, the jury in this case implicitly found the testimony of Dr. Buck and Dr. Leavitt to be more credible and, after reviewing the record, we find no valid reason to substitute our judgement for that of the trier of fact. *See Tittlebach*, 324 Ill. App. 3d at 11.

Moreover, we note that Dr. Buck and Dr. Leavitt did not rely solely upon respondent's past crimes or actuarial instruments in arriving at their opinions. Either one or both witnesses also relied upon clinical judgment, a clinical interview with respondent, respondent's mental-disorder diagnoses and refusal to undergo treatment, and a review of respondent's master file, which included prior mental health evaluations by DOC and DHS personnel and documents relating to respondent's disciplinary history and behavior while incarcerated and in civil detention.

In conclusion, we find that there was more than sufficient evidence to support the jury's finding that respondent is a sexually violent person, and we therefore reject his claim that he is entitled to judgment notwithstanding the verdict.

Respondent next claims that the trial court abused its discretion by admitting evidence of the details of his past crimes, including those of which he was never convicted. Specifically, respondent claims that the court erred by allowing the State to describe his past crimes in detail during opening and closing statements, the direct examination of Dr. Buck, and the cross- examination of Dr. Leavitt. Respondent acknowledges that, under the Act, the State must prove that he has been convicted of a sexually violent offense, but argues that certified copies of his convictions would have sufficiently satisfied the State's burden and that he was severely prejudiced by the admission of evidence of his past crimes.

Respondent's arguments is based on *People v. Winterhalter*, 313 Ill. App. 3d 972, 979 (2000), where the court held that it was error for the trial court to permit a victim to testify regarding the details of the respondent's crime in order to prove that he had been convicted of a sexually violent offense. In so holding, the court noted that the State could sufficiently prove that element by the introduction of a certified copy of the respondent's conviction, and that such details "would be admissible only if relevant to the remaining issues of whether the person has a mental disorder and is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence." *Winterhalter*, 313 Ill. App. 3d at 979.

While we agree with the principle articulated in *Winterhalter*, we note that, in this case, the State did not discuss or elicit testimony regarding the details of respondent's past crimes in order to prove that respondent had been convicted of a sexually violent offense. Rather, consistent with the holding in

*Winterhalter*, the record shows that the State proved that element by introducing certified copies of respondent's convictions.

Moreover, it is the trial court's responsibility to weigh the probative value and potential prejudicial effect of evidence, and the court's decision will not be reversed absent an abuse of that discretion. *Winterhalter*, 313 Ill. App. 3d at 978. For the reasons that follow, we find that the trial court did not abuse its discretion by allowing the State to elicit testimony regarding the details of respondent's past crimes.

Respondent first maintains that the court abused its discretion by allowing the State to describe the details of respondent's past crimes during opening and closing statements. The record shows that, during opening and closing statements, the State told the jury that Dr. Buck and Dr. Leavitt relied upon the facts of respondent's past criminal actions to arrive at their opinions, and discussed how respondent gained access to his victim's homes and the manner in which he committed his subsequent sexual offenses. The record also shows, however, that respondent did not object to these descriptions during the State's opening or closing statement. Moreover, although respondent argued in his posttrial motion that the court erred by allowing the State to elicit details of the underlying crimes, respondent's argument focused on when these details were elicited during witness testimony and made no mention of this alleged error in the context of opening and closing arguments. It is well settled that the failure to make a timely objection at trial and renew that objection in a written posttrial motion results in the waiver of the right to raise the issue on appeal. *People v. Herrett*, 137 Ill. 2d 195, 209 (1990); *People v.*

*Enoch*, 122 Ill. 2d 176, 187 (1988). Accordingly, we find that respondent's claim regarding opening and closing statements is waived.

Respondent also complains that the trial court abused its discretion in allowing Dr. Buck to testify regarding the details of respondent's past sexual crimes. Respondent claims that such testimony served only to inflame the jury and was unnecessary for Dr. Buck's diagnosis of paraphilia nos. We disagree.

In this case, Dr. Buck testified to the facts surrounding each of respondent's rape convictions and to facts from cases in which respondent was arrested and charged with a sexually related offense. Dr. Buck also testified that she relied upon these facts in evaluating respondent and reaching her expert opinions. An expert witness may properly testify to facts upon which her opinion is based (*In re Detention of Isbell*, 333 Ill. App. 3d 906, 913 (2002)), and we therefore find nothing improper in Dr. Buck's testimony in this regard. Moreover, the record shows that prior to Dr. Buck's testimony, the trial court instructed the jury that the details of respondent's past crimes were being admitted to aid the jury in understanding the basis of Dr. Buck's opinion and not to prove the truth of the matter asserted. There is a strong presumption that jurors follow the instructions given by the court (*People v. Harris*, 288 Ill. App. 3d 597, 605 (1997)), and nothing in the record rebuts that presumption. Under these circumstances, we find that the trial court did not abuse its discretion by allowing Dr. Buck to testify regarding the details of respondent's past crimes. *See Isbell*, 333 Ill. App. 3d at 914 (finding that, even absent a limiting instruction, trial court did not

abuse its discretion in allowing State's experts to testify about facts underlying the respondent's sexual crimes where the experts testified that they relied upon those facts in forming their opinions).

Finally, respondent argues that the trial court abused its discretion by allowing the State to mention details of his past crimes during its cross-examination of respondent's expert witness, Dr. Lytton. The scope of cross-examination lies within the sound discretion of the trial court, and the court's ruling will not be overturned abuse a clear abuse of that discretion. *People v. Foster*, 322 Ill. App. 3d 780, 785 (2000).

During its cross-examination of Dr. Lytton, the State essentially summarized the facts from respondent's past crimes, including each of his rape convictions, and asked Dr. Lytton whether she had considered them in arriving at her opinions. The trial court overruled respondent's objection to this line of questioning, stating that it was proper to cross-examine Dr. Lytton about these facts because they went to the credibility of her expert opinions. Respondent now claims that the State's questioning was beyond the scope of Dr. Lytton's direct examination and for the sole purpose of showing that he engaged in sexual behavior with nonconsenting persons which, respondent asserts, was already a stipulated fact.

After reviewing the record, we find nothing improper in the State's cross-examination of Dr. Lytton. During cross-examination, counsel is permitted to probe the weaknesses in the bases of an expert's opinion as well as the general soundness of that opinion. *Stevens*, 345 Ill. App. 3d at 1061. In this

case, Dr. Lytton testified that she relied upon respondent's past crimes in arriving at her opinions in this case. Because Dr. Lytton relied upon those cases in arriving at her opinions, we conclude that it was entirely proper for the State to question her about the facts from those cases and whether they were consistent with her opinions. Accordingly, we find that the trial court did not abuse its discretion in allowing the State to cross-examine Dr. Lytton about the details of respondent's sexual crimes.

Respondent next contends that the trial court abused its discretion by excluding the expert testimony of Dr. Robert Kinscherff. The decision of whether to allow expert testimony is committed to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of that discretion. *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 469 (2001). An individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. *People v. Mertz*, 218 Ill. 2d 1, 72 (2005).

The record shows that the State objected when respondent attempted to call Dr. Kinscherff to testify and that the trial court allowed respondent to elicit from Dr. Kinscherff his proposed testimony in order to make an offer of proof. Dr. Kinscherff testified that as psychologists, Dr. Buck and Dr. Leavitt had a professional obligation to disclose the limitations of the actuarial tools and other data upon which they relied. According to Dr. Kinscherff, this professional obligation or code of conduct derive from the APA code of ethics as well as guidelines established by the ATSA and "Division 41."

Following the *voir dire*, the trial court barred Dr. Kinscherff's testimony on three grounds. First, his testimony would prejudice the State because, in his deposition, Dr. Kinscherff stated that he had not reviewed Dr. Leavitt's report for ethical improprieties. Second, because the State's case relied upon Dr. Buck's and Dr. Leavitt's trial testimony and not their written reports, Dr. Kinscherff's testimony regarding those written reports would not have aided the jury. Finally, the court concluded that Dr. Kinscherff's testimony was cumulative to the testimony offered by the other witnesses.

Respondent claims that the trial court's ruling was erroneous. Specifically, respondent asserts that the jury could have concluded that Dr. Buck and Dr. Leavitt violated their professional duty to disclose the limits of the actuarial tools and data upon which they relied because their testimony was "replete with undisclosed errors," and that Dr Kinscherff's testimony would have given the jury a benchmark by which to judge the witnesses' credibility.

Upon review, we find that the trial court did not abuse its discretion by barring Dr. Kinscherff's testimony for the following reasons. First, we find that the trial court properly barred Dr. Kinscherff's testimony regarding Dr. Leavitt based on respondent's failure to comply with discovery rules. Supreme Court Rule 213(g) (210 Ill. 2d R. 213(g)) requires parties to disclose, among other things, the opinions and conclusions of all witnesses offering opinion testimony. *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 469 (2001). An expert's testimony must be consistent with and is limited to the scope of opinions disclosed during discovery. *Sinclair*, 325 Ill. App. 3d at 469. The determination of an appropriate sanction

for a discovery violation lies within the trial court's discretion. *People v. Mullen*, 313 Ill. App. 3d 718, 736 (2000).

Respondent claims that Dr. Kinscherff's opinions regarding Dr. Leavitt were disclosed well in advance of trial and were therefore improperly excluded. However, the only citation made in support of this claim is to a series of pages in the trial transcript where respondent's counsel is arguing to the court that Dr. Kinscherff's opinions were disclosed during discovery. Respondent has failed to cite to any other pages of the record to support his contention, and his failure to do so results in waiver of this argument on appeal. *See Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) (failure to properly present an issue or cite to pages of the record relied upon violates Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)) and results in waiver of their contention on appeal).

Additionally, in the aforementioned section of the record cited by respondent, the State reads into the record a portion of Dr Kinscherff's deposition testimony in which he states that he had not reviewed Dr. Leavitt's deposition and that he was not asked to consider Dr. Leavitt's work for ethical violations. Regardless, respondent has not cited to Dr. Kinscherff's deposition and we have been unable to locate the deposition in the record. It is not our responsibility to scour the record in order to reverse the trial court's judgment. *In re G.W.*, 357 Ill. App. 3d 1058, 1061 (2005). Moreover, respondent has the burden of providing a sufficiently complete record to support a claim of error (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)), and absent such a record we will presume that the trial court's ruling had a sufficient factual basis (*Corral v. Mervis Industries, Inc.*, 217

Ill. 2d 144, 156 (2005)). Here, where we do not have a sufficient record to determine whether Dr. Kinscherff's opinions regarding Dr. Leavitt were properly disclosed, we will presume that the trial court had a sufficient basis upon which to conclude that they were not and we therefore find that the court did not err by precluding Dr. Kinscherff from testifying on that basis.

Moreover, we find that Dr. Kinscherff's testimony would have been cumulative. The trial court has discretion to bar an expert from testifying if the expert's testimony would be cumulative. *Kotvan v. Kirk*, 321 Ill. App. 3d 733, 748-49 (2001). Here, although respondent frames his contention in terms of Dr. Buck's and Dr. Leavitt's professional obligations, we find his argument to be no more than a recasting of his previous attack on the credibility of these witnesses and the weight to be given to their testimony. Our review establishes that the substance of Dr. Kinscherff's testimony would have dealt with the alleged errors and limitations in Dr. Buck's and Dr. Leavitt's diagnoses and use of actuarial tools, which are all issues that were fully explored at trial through the testimony of the other witnesses. Moreover, Dr. Leavitt testified that the ATSA advises psychologists to discuss the limits of any conclusions that are not based on personal interviews, and Dr. Buck testified that the ATSA advises psychologists to use multiple sources of information when making evaluations. Under these circumstances, we find that the trial court did not abuse its discretion in concluding that Dr. Kinscherff's testimony would have been cumulative.

Respondent further contends that the trial court abused its discretion by denying his motion for a new

trial. Respondent asserts that the jury's verdict was against the manifest weight of the evidence because the opposite conclusion, that he is not a sexually violent person, is clearly evident. However, respondent's contention is no more than a reiteration of his previous claim that he is entitled to judgment notwithstanding the verdict. We have already rejected that claim and found that there was sufficient evidence upon which the jury could reasonably find that respondent is a sexually violent person. We find that conclusion dispositive of respondent's current contention and, accordingly, we find no abuse of discretion in the trial court's denial of respondent's motion for a new trial.

Respondent next contends that the trial court abused its discretion by ordering him confined for institutional care in a secure facility. Respondent asserts that the trial court relied heavily upon the "flawed" testimony of Dr. Buck and Dr. Leavitt and ignored undisputed evidence that he is an appropriate candidate for conditional release. Specifically, respondent argues that he should have been conditionally released because his crimes occurred over 26 years ago, he has behaved well while in custody and, if released, he would live with his fiancée, be gainfully employed as law clerk and undergo treatment.

Section 40(a) of the Act provides that, when a person is found to be a sexually violent person, the court "shall order the person to be committed to the custody of the [DHS]." 725 ILCS 207/40(a) (West 2006). Section 40(b)(2) of the Act provides that the order of commitment shall specify either institutional care in a secure facility or conditional release. 725 ILCS 207/40(b)(2) (West 2006). In making this

determination, the court may consider (1) the nature and circumstances of the behavior that was the basis of the allegations in the State's petition; (2) the person's mental history and present mental condition; (3) where the person will live; (4) how the person will support himself; and (5) what arrangements are available to ensure that the person has access to and will participate in necessary treatment. 725 ILCS 207/40(b)(2) (West 2006). We review the trial court's decision to commit respondent to a secure facility under an abuse of discretion standard. *Erbe*, 344 Ill. App. 3d at 374. An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Erbe*, 344 Ill. App. 3d at 374.

In this case, the record shows that the trial court heard and considered evidence pertaining to all of the relevant factors prior to ordering respondent committed to a secure facility. Dr. Buck and Dr. Leavitt testified that respondent suffered from mental disorders that made it substantially probable that he would engage in future acts of sexual violence. Moreover, the record establishes that respondent has refused to acknowledge his past sexual offenses or undergo treatment for his mental disorders. Although respondent points to evidence that he claims warrants his conditional release, the record shows that the trial court was presented with and considered all of this evidence, and on review, we will not reweigh the relevant factors or substitute our judgement for that of the trial court. *See Erbe*, 344 Ill. App. 3d at 374. Here, considering all of the evidence before the trial court, including the testimony of the State's expert witnesses, the nature and

circumstances of respondent's behavior, the jury's finding regarding respondent's mental conditions, and respondent's refusal to undergo treatment or acknowledge his past criminal offenses, we cannot say that the court abused its discretion in ordering respondent committed to a secure facility. *See Tittlebach*, 324 Ill. App. 3d at 13 (trial court did not abuse its discretion in ordering respondent committed to a secure facility where experts testified that respondent's mental disorders made it substantially probable that he would commit future acts of sexual violence and respondent never participated in treatment while incarcerated).

In reaching this conclusion, we note that respondent's claim that he does not suffer from a mental disorder and his challenge to the contrary testimony of Dr. Buck and Dr. Leavitt amounts to an attack on the credibility of the State's expert witnesses and the weight to be given to their testimony. As previously noted, the duty of evaluating the evidence and determining the credibility of the witnesses lies with the trier of fact and not the reviewing court. *Erbe*, 344 Ill. App. 3d at 374 (rejecting respondent's claim that the court erred in relying on the "questionable" testimony of the State's expert witnesses in committing him to institutional care as an attack on the credibility of the witnesses and noting that such determinations are properly made by the trial court and not the reviewing court).

Respondent's final contention is that the trial court erred in denying the renewed motion to dismiss based upon a corrected release date. Respondent claims that, because the circuit court ordered he receive 1,004 days of pretrial credit in *People v.*

*Lieberman*, No. 80 C 208 (Cir. Ct. Cook Co.), his correct release date from the DOC should have been April 10, 1997, not January 9, 2000. Therefore, because the Act did not become effective until January 1, 1998, respondent asserts that it does not apply to him and the trial court should have dismissed the State's petition.

We find that respondent has waived this contention by failing to comply with Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)). Supreme Court Rule 341(h)(7) requires appellant's brief to include " '[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on.'" *Salgado v. Marquez*, 356 Ill. App. 3d 1072, 1074 (2005), quoting 210 Ill. 2d R. 341(h)(7). "'[A] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.'" *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1994), quoting *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986). An issue not clearly defined and sufficiently presented fails to satisfy the requirements of Supreme Court Rule 341(h)(7) and is, therefore, waived. *Vincent v. Doebert*, 183 Ill. App. 3d 1081, 1087 (1989).

In this case, respondent has failed to adequately cite to the record or pertinent authority or to explain the basis of his conclusion that his release date should be April 10, 1997. His argument in this regard consists of one paragraph, and it is insufficient upon which to verify his claims. It appears that, in his reply brief, respondent attempts to further explain

this issue by noting that his release date was scheduled to be January 2003 and that, in addition to the 1,004 days of pretrial credit, he also earned 1,155 days of "Meritorious Good Time (MGT) credit." We find that these points are waived because respondent did not raise them in his opening brief. *See* 210 Ill. 2d R. 341(h)(7) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief"); *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 384-85 (1997). Moreover, respondent does not cite to the record to support his statement that he earned 1,155 days of MGT credit, and we are therefore unable to determine the veracity of this claim. We note that the record does contain a decision of the Second District of the this court affirming the judgment of the circuit court of Cook County denying his request for 1,150 days of MGT credit. *See Lieberman v. Peters*, No. 2-96-0196 (1996) (unpublished order pursuant to Supreme Court Rule 23). In that case, the court found that respondent failed to present any proof in support of his claim and affirmed the circuit court's findings that respondent had not proven by clear and convincing evidence that he earned 1,150 days of MGT credit and that his testimony was not substantiated by an written documents except for one memorandum which was forged. *Lieberman*, slip op. at 4. Because of respondent's failure to adequately present this issue, we cannot determine if this decision involves the same MGT credit that respondent is now claiming. In conclusion, due to respondent's failure to comply with Rule 341, we find that he has waived the contention that the trial court erred by denying his renewed motion to dismiss.

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County. Judgment affirmed.

J. GORDON and O'MALLEY, JJ., concur.

## APPENDIX B

Clerk's Office
Appellate Court First District
State of Illinois
160 N. LaSalle
Suite 1400
Chicago, IL 60601

11/13/08

Honorable Dorothy Brown
Richard J. Daley Center
Room 1001
Chicago, IL 60602

Re: In Re: The Detention of Brad Lieberman
Appellate Court No. 1-06-1272
Trial Court No. 00CR80001

Dear Honorable Brown:

Attached is the Mandate of the Appellate Court in the above entitled cause.

We are sending the attorneys of record a copy of this letter to inform them that the mandate of the Appellate Court has been filed with you.

Steven M. Ravid
Clerk of the Appellate Court
First District, Illinois

cc: Winston & Strawn LLP.
35 West Wacker Drive
Chicago, IL 60601

## APPENDIX C

106400 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035
September 24, 2008

Mr. Giel Stein
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601

No. 106400 - In re Detention of Brad Lieberman (People State of Illinois, respondent, v. Brad Lieberman, petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 2008.

## APPENDIX D

## IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| *In re* DETENTION OF Brad LIEBERMAN | ) | |
| (The People of the State of Illinois, Petitioner-Appellee, | ) | No. 1-06-1272 |
| v. | ) | |
| Brad Lieberman Respondent-Appellant). | ) | |

### ORDER

This cause coming on to be heard on Respondent 's Petition for Rehearing, and the court being fully advised in the premises, IT IS HEREBY ORDERED that the petition is DENIED.

ORDER ENTERED

March 20, 2008

APPELLATE COURT, FIRST DISTRICT

_____/s/_____

Justice

_____/s/_____
Justice

_____/s/_____
Justice

## APPENDIX E

**ORDER** **CCG-N002-75M-10/8/04 (43350124)**

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

| | | |
|---|---|---|
| In Re Commitment of | ) | |
| | ) | **No. 00CR80001** |
| Brad Lieberman | ) | |

**ORDER**

This matter is coming to be heard on previous order of the Court for status. Respondent present and in the custody of DHS and Represented by counsel. State present by AAG Kress and O'Keefe and ASA Murphy. The Court being advised in the premises.

It is hereby ordered that:

Respondent's Post Trial motion filed on April 7, 2006 is denied.

The matter is set by agreement for dispositional hearing on April 26, 2006.

The Respondent to file written brief with the Court and State by April 24, 2006. Respondent to be transported by DHS in accordance with this order.

**Atty. No.:** AAG
**Name:** Erin O'Keefe
**Atty. for:** People
**Address:** 100 West Randolph
**City/State/Zip:** Chicago, IL
**Telephone:** _____

**ENTERED:**

**Dated:** 4-10, 2006
/s/ 1512
Judge Judge No.

# DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

## APPENDIX F

## IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

| | | |
|---|---|---|
| IN RE THE COMMITMENT OF BRAD LIEBERMAN | ) ) ) ) | No. 00CR-80001 |

## ORAL RULING DENYING MOTION FOR DIRECTED VERDICT (TRANSCRIPT OF PROCEEDINGS February 7, 2006)

14

* * *

10 Because the State's experts
11 admitted that Mr. Lieberman has complete
12 control of himself as he sits here today, the
13 State cannot succeed in its case as well. The
14 State's own experts admitted that Mr. Lieberman
15 has no mental illness. Also defeating one of
16 the elements that they must prove.
17 And finally, all four of the
18 mental disorders that the experts allege
19 Mr. Lieberman had, they fail to produce
20 sufficient evidence of those mental disorders;
21 therefore, the case against Mr. Lieberman
22 should be dismissed.
23 THE COURT: State, you want to

24 respond?



1 MS. MARASCO: Yes, your Honor.
2 The State has made a showing of
3 all three elements that the statements prove
4 beyond a reasonable doubt. And the issues that
5 counsel brings up. One: The issue of a mental
6 illness. The statute does not require that the
7 State prove beyond a reasonable doubt that he
8 suffers from a mental illness.
9 The statute specifically defines
10 a mental disorder pursuant to the Sexually
11 Violent Persons Act. And both Doctor Leavitt
12 and Doctor Buck testified that he does, indeed,
13 suffer from that type of mental disorder.
14 So I am saying that you deny
15 that motion.
16 THE COURT: Your motion for directed
17 finding is denied. It's a question of weight
18 to be given from the evidence. There is
19 evidence from which the jury could, if they
20 believe it, to determine every element of the
21 case the State is required to prove.
22 MS. DOHLIN: Thank you, your Honor.
23 THE COURT: You are welcome.

## APPENDIX G

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT – CRIMINAL DIVISION**

| | | |
|---|---|---|
| IN RE THE COMMITMENT OF, | ) | |
| BRAD LIEBERMAN | ) | No. 00CR- |
| | ) | 80001 |
| Respondent. | ) | |

**SEXUALLY VIOLENT PERSON JUDGMENT AND COMMITMENT ORDER**

This cause having been tried before the court, and a verdict having been returned finding the Respondent to be a sexually violent person;

**IT IS HEREBY ORDERED AS FOLLOWS;**

1. The Court enters judgment on said verdict and that based upon said verdict the Respondent is hereby adjudged to be a sexually violent person, and that the Respondent is committed to the custody of the Illinois Department of Human Services for control, care and treatment until further order of this court; and

2. The Court finds that it has sufficient information without the necessity of a predisposition investigation or a supplementary mental examination to make the determination under 725 ILCS 207/40(b)(2) as to whether the Respondent's commitment should be for institutional care in a secure facility or for

conditional release, and that after considering the factors set forth in 725 ILCS 207/40(b)(2) this Court orders that the Respondent's commitment shall be for institutional care in a secure facility; and

3. Pursuant to 725 ILCS 207/45 the Respondent is ordered to provide a biological specimen for deoxyribonucleic acid analysis if required; and

4. The Illinois Department of Human Services shall conduct a reexamination of the Respondent within six (6) months of today pursuant to 725 ILCS 207/55(a) to determine whether the Respondent has made sufficient progress to be conditionally released or discharged. Report is due October 26, 2006

5. This cause is continued to 11/2/06.

DATED: 4/26/06 ENTER: ___/s/_____ JUDGE

## APPENDIX H

**ORDER CCG N002-300M-2/08/05(43480658)**

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

IN RE THE COMMITMENT OF )
BRAD LIEBERMAN ) No. 00CR-80001
)
)

**ORDER**

This mater is coming on for commenced and continued jury trial, the jury rendering a verdict that the respondent is a sexually violent person, the court hereby orders that:

1. Judgment is entered on the jury's verdict;
2. The Respondent shall provide a DNA specimen as set forth by the Act (725 ILCS 207/45);
3. The matter is continued for dispositional hearing on 3/10/06 at 9:30 a.m.;
4. DHS shall transport the Respondent in accordance with this court order.

Atty. No.: OAG ENTERED:

Name: Marasco

Atty.for: People Dated: 2-16, 2006

Address: 100 W. Randolph

City/State/Zip: Chicago, IL ____/s/_____1512

Telephone: 312 814 3530 Judge Judge's No.

DORTHY BROWN, CLERK OF THE CIRCUIT
COURT OF COOK COUNTY, ILLINOIS

# APPENDIX I

## (725 ILCS 207/1 (2006)) SEXUALLY VIOLENT PERSONS COMMITMENT ACT.

(725 ILCS 207/1)

Sec. 1. Short title. This Act may be cited as the Sexually Violent Persons Commitment Act.

(Source: P.A. 90-40, eff. 1-1-98.)

(725 ILCS 207/5)

Sec. 5. Definitions. As used in this Act, the term:

(a) "Department" means the Department of Human Services.

(b) "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.

(c) "Secretary" means the Secretary of Human Services.

(d) "Sexually motivated" means that one of the purposes for an act is for the actor's sexual arousal or gratification.

(e) "Sexually violent offense" means any of the following:

(1) Any crime specified in Section 11-6, 12-13, 12-14, 12-14.1, or 12-16 of the Criminal Code of 1961; or

(1.5) Any former law of this State specified in Section 11-1 (rape), 11-3 (deviate sexual assault),

11-4 (indecent liberties with a child) or 11-4 (aggravated indecent liberties with a child) of the Criminal Code of 1961; or

(2) First degree murder, if it is determined by the agency with jurisdiction to have been sexually motivated; or

(3) Any solicitation, conspiracy or attempt to commit a crime under paragraph (e)(1) or (e)(2) of this Section.

(f) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.

(Source: P.A. 94-746, eff. 5-8-06.)

(725 ILCS 207/9)

Sec. 9. Sexually violent person review; written notification to State's Attorney. The Illinois Department of Corrections or the Department of Juvenile Justice, not later than 6 months prior to the anticipated release from imprisonment or the anticipated entry into mandatory supervised release of a person who has been convicted or adjudicated delinquent of a sexually violent offense, shall send written notice to the State's Attorney in the county in which the person was convicted or adjudicated delinquent of the sexually violent offense informing the State's Attorney of the person's anticipated

release date and that the person will be considered for commitment under this Act prior to that release date.

(Source: P.A. 94-992, eff. 1-1-07.)

(725 ILCS 207/10)

Sec. 10. Notice to the Attorney General and State's Attorney.

(a) In this Act, "agency with jurisdiction" means the agency with the authority or duty to release or discharge the person.

(b) If an agency with jurisdiction has control or custody over a person who may meet the criteria for commitment as a sexually violent person, the agency with jurisdiction shall inform the Attorney General and the State's Attorney in a position to file a petition under paragraph (a)(2) of Section 15 of this Act regarding the person as soon as possible beginning 3 months prior to the applicable date of the following:

(1) The anticipated release from imprisonment or the anticipated entry into mandatory supervised release of a person who has been convicted of a sexually violent offense.

(2) The anticipated release from a Department of Corrections correctional facility or juvenile correctional facility of a person adjudicated delinquent under Section 5-20 of the Juvenile Court Act of 1987 (now repealed) or found guilty under Section 5-620 of that Act, on the basis of a sexually violent offense.

(3) The discharge or conditional release of a person who has been found not guilty of a sexually violent offense by reason of insanity under Section 5-2-4 of the Unified Code of Corrections.

(c) The agency with jurisdiction shall provide the Attorney General and the State's Attorney with all of the following:

(1) The person's name, identifying factors, anticipated future residence and offense history;

(2) A comprehensive evaluation of the person's mental condition, the basis upon which a determination has been made that the person is subject to commitment under subsection (b) of Section 15 of this Act and a recommendation for action in furtherance of the purposes of this Act. The evaluation shall be conducted in conformance with the standards developed under the Sex Offender Management Board Act and by an evaluator approved by the Board; and

(3) If applicable, documentation of any treatment and the person's adjustment to any institutional placement.

(d) Any agency or officer, employee or agent of an agency is immune from criminal or civil liability for any acts or omissions as the result of a good faith effort to comply with this Section.

(Source: P.A. 93-616, eff. 1-1-04.)

(725 ILCS 207/15)

Sec. 15. Sexually violent person petition; contents; filing.

(a) A petition alleging that a person is a sexually violent person may be filed by:

(1) The Attorney General, at the request of the agency with jurisdiction over the person, as defined in subsection (a) of Section 10 of this Act, or on his or her own motion. If the Attorney General, after consulting with and advising the State's Attorney of the county referenced in paragraph (a)(2) of this Section, decides to file a petition under this Section, he or she shall file the petition before the release or discharge of the person or within 30 days of placement onto parole or mandatory supervised release for an offense enumerated in paragraph (e) of Section 5 of this Act.

(2) If the Attorney General does not file a petition under this Section, the State's Attorney of the county in which the person was convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense or found not guilty of or not responsible for a sexually violent offense by reason of insanity, mental disease, or mental defect may file a petition.

(3) The Attorney General and the State's Attorney referenced in paragraph (a)(2) of this Section jointly.

(b) A petition filed under this Section shall allege that all of the following apply to the person alleged to be a sexually violent person:

(1) The person satisfies any of the following criteria:

(A) The person has been convicted of a sexually violent offense;

(B) The person has been found delinquent for a sexually violent offense; or

(C) The person has been found not guilty of a sexually violent offense by reason of insanity, mental disease, or mental defect.

(2) (Blank).

(3) (Blank).

(4) The person has a mental disorder.

(5) The person is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence.

(b-5) The petition must be filed no more than 90 days before discharge or entry into mandatory supervised release from a Department of Corrections or the Department of Juvenile Justice correctional facility for a sentence that was imposed upon a conviction for a sexually violent offense. For inmates sentenced under the law in effect prior to February 1, 1978, the petition shall be filed no more than 90 days after the Prisoner Review Board's order granting parole pursuant to Section 3-3-5 of the Unified Code of Corrections.

(b-6) The petition must be filed no more than 90 days before discharge or release:

(1) from a Department of Juvenile Justice juvenile correctional facility if the person was placed in the facility for being adjudicated delinquent under Section 5-20 of the Juvenile Court Act of 1987 or found guilty under Section 5-620 of that Act on the basis of a sexually violent offense; or

(2) from a commitment order that was entered as a result of a sexually violent offense.

(b-7) A person convicted of a sexually violent offense remains eligible for commitment as a sexually violent person pursuant to this Act under the following circumstances: (1) the person is in custody for a sentence that is being served concurrently or consecutively with a sexually violent offense; (2) the person returns to the custody of the Illinois Department of Corrections or the Department of Juvenile Justice for any reason during the term of parole or mandatory supervised release being served for a sexually violent offense; or (3) the person is convicted or adjudicated delinquent for any offense committed during the term of parole or mandatory supervised release being served for a sexually violent offense, regardless of whether that conviction or adjudication was for a sexually violent offense.

(c) A petition filed under this Section shall state with particularity essential facts to establish probable cause to believe the person is a sexually violent person. If the petition alleges that a sexually violent offense or act that is a basis for the allegation under paragraph (b)(1) of this Section was an act that was sexually motivated as provided under paragraph (e)(2) of Section 5 of this Act, the petition shall state the grounds on which the offense or act is alleged to be sexually motivated.

(d) A petition under this Section shall be filed in either of the following:

(1) The circuit court for the county in which the person was convicted of a sexually violent offense, adjudicated delinquent for a sexually violent

offense or found not guilty of a sexually violent offense by reason of insanity, mental disease or mental defect.

(2) The circuit court for the county in which the person is in custody under a sentence, a placement to a Department of Corrections correctional facility or a Department of Juvenile Justice juvenile correctional facility, or a commitment order.

(e) The filing of a petition under this Act shall toll the running of the term of parole or mandatory supervised release until:

(1) dismissal of the petition filed under this Act;

(2) a finding by a judge or jury that the respondent is not a sexually violent person; or

(3) the sexually violent person is discharged under Section 65 of this Act, unless the person has successfully completed a period of conditional release pursuant to Section 60 of this Act.

(Source: P.A. 94-696, eff. 6-1-06; 94-992, eff. 1-1-07.)

(725 ILCS 207/20)

Sec. 20. Civil nature of proceedings. The proceedings under this Act shall be civil in nature. The provisions of the Civil Practice Law, and all existing and future amendments of that Law shall apply to all proceedings hereunder except as otherwise provided in this Act.

(Source: P.A. 90-40, eff. 1-1-98.)

(725 ILCS 207/25)

Sec. 25. Rights of persons subject to petition.

(a) Any person who is the subject of a petition filed under Section 15 of this Act shall be served with a copy of the petition in accordance with the Civil Practice Law.

(b) The circuit court in which a petition under Section 15 of this Act is filed shall conduct all hearings under this Act. The court shall give the person who is the subject of the petition reasonable notice of the time and place of each such hearing. The court may designate additional persons to receive these notices.

(c) Except as provided in paragraph (b)(1) of Section 65 and Section 70 of this Act, at any hearing conducted under this Act, the person who is the subject of the petition has the right:

(1) To be present and to be represented by counsel. If the person is indigent, the court shall appoint counsel.

(2) To remain silent.

(3) To present and cross-examine witnesses.

(4) To have the hearing recorded by a court reporter.

(d) The person who is the subject of the petition, the person's attorney, the Attorney General or the State's Attorney may request that a trial under Section 35 of this Act be to a jury. A verdict of a jury under this Act is not valid unless it is unanimous.

(e) Whenever the person who is the subject of the petition is required to submit to an examination under this Act, he or she may retain experts or professional persons to perform an examination. If the person retains a qualified expert or professional person of his or her own choice to conduct an examination, the examiner shall have reasonable access to the person for the purpose of the examination, as well as to the person's past and present treatment records and patient health care records. If the person is indigent, the court shall, upon the person's request, appoint a qualified and available expert or professional person to perform an examination. Upon the order of the circuit court, the county shall pay, as part of the costs of the action, the costs of a court-appointed expert or professional person to perform an examination and participate in the trial on behalf of an indigent person.

(Source: P.A. 93-616, eff. 1-1-04; 93-970, eff. 8-20-04.)

(725 ILCS 207/30)

Sec. 30. Detention; probable cause hearing; transfer for examination.

(a) Upon the filing of a petition under Section 15 of this Act, the court shall review the petition to determine whether to issue an order for detention of the person who is the subject of the petition. The person shall be detained only if there is cause to believe that the person is eligible for commitment under subsection (f) of Section 35 of this Act. A person detained under this Section shall be held in a facility approved by the Department. If the person is

serving a sentence of imprisonment, is in a Department of Corrections correctional facility or juvenile correctional facility or is committed to institutional care, and the court orders detention under this Section, the court shall order that the person be transferred to a detention facility approved by the Department. A detention order under this Section remains in effect until the person is discharged after a trial under Section 35 of this Act or until the effective date of a commitment order under Section 40 of this Act, whichever is applicable.

(b) Whenever a petition is filed under Section 15 of this Act, the court shall hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person. If the person named in the petition is in custody, the court shall hold the probable cause hearing within 72 hours after the petition is filed, excluding Saturdays, Sundays and legal holidays. The court may grant a continuance of the probable cause hearing for no more than 7 additional days upon the motion of the respondent, for good cause. If the person named in the petition has been released, is on parole, is on mandatory supervised release, or otherwise is not in custody, the court shall hold the probable cause hearing within a reasonable time after the filing of the petition. At the probable cause hearing, the court shall admit and consider all relevant hearsay evidence.

(c) If the court determines after a hearing that there is probable cause to believe that the person named in the petition is a sexually violent person, the court shall order that the person be taken into custody if he or she is not in custody and shall order

the person to be transferred within a reasonable time to an appropriate facility for an evaluation as to whether the person is a sexually violent person. If the person who is named in the petition refuses to speak to, communicate with, or otherwise fails to cooperate with the examining evaluator from the Department of Human Services or the Department of Corrections, that person may only introduce evidence and testimony from any expert or professional person who is retained or court-appointed to conduct an examination of the person that results from a review of the records and may not introduce evidence resulting from an examination of the person. Notwithstanding the provisions of Section 10 of the Mental Health and Developmental Disabilities Confidentiality Act, all evaluations conducted pursuant to this Act and all Illinois Department of Corrections treatment records shall be admissible at all proceedings held pursuant to this Act, including the probable cause hearing and the trial.

If the court determines that probable cause does not exist to believe that the person is a sexually violent person, the court shall dismiss the petition.

(d) The Department shall promulgate rules that provide the qualifications for persons conducting evaluations under subsection (c) of this Section.

(e) If the person named in the petition claims or appears to be indigent, the court shall, prior to the probable cause hearing under subsection (b) of this Section, appoint counsel.

(Source: P.A. 92-415, eff. 8-17-01; 93-616, eff. 1-1-04; 93-970, eff. 8-20-04.)

(725 ILCS 207/35)

Sec. 35. Trial.

(a) A trial to determine whether the person who is the subject of a petition under Section 15 of this Act is a sexually violent person shall commence no later than 120 days after the date of the probable cause hearing under Section 30 of this Act. Delay is considered to be agreed to by the person unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record. Delay occasioned by the person temporarily suspends for the time of the delay the period within which a person must be tried. If the delay occurs within 21 days after the end of the period within which a person must be tried, the court may continue the cause on application of the State for not more than an additional 21 days beyond the period prescribed. The court may grant a continuance of the trial date for good cause upon its own motion, the motion of any party or the stipulation of the parties, provided that any continuance granted shall be subject to Section 103-5 of the Code of Criminal Procedure of 1963.

(b) At the trial on the petition it shall be competent to introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were imposed. The petitioner may present expert testimony from both the Illinois Department of Corrections evaluator and the Department of Human Services psychologist.

(c) The person who is the subject of the petition, the person's attorney, the Attorney General or the State's Attorney may request that a trial under this Section be by a jury. A request for a jury trial under

this subsection shall be made within 10 days after the probable cause hearing under Section 30 of this Act. If no request is made, the trial shall be by the court. The person, the person's attorney or the Attorney General or State's Attorney, whichever is applicable, may withdraw his or her request for a jury trial.

(d) (1) At a trial on a petition under this Act, the petitioner has the burden of proving the allegations in the petition beyond a reasonable doubt.

(2) If the State alleges that the sexually violent offense or act that forms the basis for the petition was an act that was sexually motivated as provided in paragraph (e)(2) of Section 5 of this Act, the State is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated.

(e) Evidence that the person who is the subject of a petition under Section 15 of this Act was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder.

(f) If the court or jury determines that the person who is the subject of a petition under Section 15 is a sexually violent person, the court shall enter a judgment on that finding and shall commit the person as provided under Section 40 of this Act. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent person, the court shall dismiss the petition and direct that the

person be released unless he or she is under some other lawful restriction.

(g) A judgment entered under subsection (f) of this Section on the finding that the person who is the subject of a petition under Section 15 is a sexually violent person is interlocutory to a commitment order under Section 40 and is reviewable on appeal.

(Source: P.A. 91-875, eff. 6-30-00; 92-415, eff. 8-17-01.)

(725 ILCS 207/40)

Sec. 40. Commitment.

(a) If a court or jury determines that the person who is the subject of a petition under Section 15 of this Act is a sexually violent person, the court shall order the person to be committed to the custody of the Department for control, care and treatment until such time as the person is no longer a sexually violent person.

(b) (1) The court shall enter an initial commitment order under this Section pursuant to a hearing held as soon as practicable after the judgment is entered that the person who is the subject of a petition under Section 15 is a sexually violent person. If the court lacks sufficient information to make the determination required by paragraph (b)(2) of this Section immediately after trial, it may adjourn the hearing and order the Department to conduct a predisposition investigation or a supplementary mental examination, or both, to assist the court in framing the commitment order. A supplementary

mental examination under this Section shall be conducted in accordance with Section 3-804 of the Mental Health and Developmental Disabilities Code.

(2) An order for commitment under this Section shall specify either institutional care in a secure facility, as provided under Section 50 of this Act, or conditional release. In determining whether commitment shall be for institutional care in a secure facility or for conditional release, the court shall consider the nature and circumstances of the behavior that was the basis of the allegation in the petition under paragraph (b)(1) of Section 15, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment. All treatment, whether in institutional care, in a secure facility, or while on conditional release, shall be conducted in conformance with the standards developed under the Sex Offender Management Board Act and conducted by a treatment provider approved by the Board. The Department shall arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's commitment order.

(3) If the court finds that the person is appropriate for conditional release, the court shall notify the Department. The Department shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the

community. The plan shall address the person's need, if any, for supervision, counseling, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. The Department may contract with a county health department, with another public agency or with a private agency to provide the treatment and services identified in the plan. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 60 days after the court finding that the person is appropriate for conditional release, unless the Department and the person to be released request additional time to develop the plan. The conditional release program operated under this Section is not subject to the provisions of the Mental Health and Developmental Disabilities Confidentiality Act.

(4) An order for conditional release places the person in the custody and control of the Department. A person on conditional release is subject to the conditions set by the court and to the rules of the Department. Before a person is placed on conditional release by the court under this Section, the court shall so notify the municipal police department and county sheriff for the municipality and county in which the person will be residing. The notification requirement under this Section does not apply if a municipal police department or county sheriff submits to the court a written statement waiving the right to be notified. If the Department alleges that a released person has violated any condition

or rule, or that the safety of others requires that conditional release be revoked, he or she may be taken into custody under the rules of the Department.

At any time during which the person is on conditional release, if the Department determines that the person has violated any condition or rule, or that the safety of others requires that conditional release be revoked, the Department may request the Attorney General or State's Attorney to request the court to issue an emergency ex parte order directing any law enforcement officer to take the person into custody and transport the person to the county jail. The Department may request, or the Attorney General or State's Attorney may request independently of the Department, that a petition to revoke conditional release be filed. When a petition is filed, the court may order the Department to issue a notice to the person to be present at the Department or other agency designated by the court, order a summons to the person to be present, or order a body attachment for all law enforcement officers to take the person into custody and transport him or her to the county jail, hospital, or treatment facility. The Department shall submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release to the committing court within 48 hours after the detention. The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person. Pending the revocation hearing, the Department may detain the person in a jail, in a hospital or treatment

facility. The State has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of others requires that the conditional release be revoked. If the court determines after hearing that any rule or condition of release has been violated, or that the safety of others requires that conditional release be revoked, it may revoke the order for conditional release and order that the released person be placed in an appropriate institution until the person is discharged from the commitment under Section 65 of this Act or until again placed on conditional release under Section 60 of this Act.

(5) An order for conditional release places the person in the custody, care, and control of the Department. The court shall order the person be subject to the following rules of conditional release, in addition to any other conditions ordered, and the person shall be given a certificate setting forth the conditions of conditional release. These conditions shall be that the person:

(A) not violate any criminal statute of any jurisdiction;

(B) report to or appear in person before such person or agency as directed by the court and the Department;

(C) refrain from possession of a firearm or other dangerous weapon;

(D) not leave the State without the consent of the court or, in circumstances in which the reason for the absence is of such an emergency nature, that prior consent by the court is not

possible without the prior notification and approval of the Department;

(E) at the direction of the Department, notify third parties of the risks that may be occasioned by his or her criminal record or sexual offending history or characteristics, and permit the supervising officer or agent to make the notification requirement;

(F) attend and fully participate in assessment, treatment, and behavior monitoring including, but not limited to, medical, psychological or psychiatric treatment specific to sexual offending, drug addiction, or alcoholism, to the extent appropriate to the person based upon the recommendation and findings made in the Department evaluation or based upon any subsequent recommendations by the Department;

(G) waive confidentiality allowing the court and

Department access to assessment or treatment results or both;

(H) work regularly at a Department approved occupation or pursue a course of study or vocational training and notify the Department within 72 hours of any change in employment, study, or training;

(I) not be employed or participate in any volunteer activity that involves contact with children, except under circumstances approved in advance and in writing by the Department officer;

(J) submit to the search of his or her person, residence, vehicle, or any personal or real property under his or her control at any time by the Department;

(K) financially support his or her dependents and provide the Department access to any requested financial information;

(L) serve a term of home confinement, the conditions of which shall be that the person:

(i) remain within the interior premises of the place designated for his or her confinement during the hours designated by the Department;

(ii) admit any person or agent designated by the Department into the offender's place of confinement at any time for purposes of verifying the person's compliance with the condition of his or her confinement;

(iii) if deemed necessary by the Department, be placed on an electronic monitoring device;

(M) comply with the terms and conditions of an order of protection issued by the court pursuant to the Illinois Domestic Violence Act of 1986. A copy of the order of protection shall be transmitted to the Department by the clerk of the court;

(N) refrain from entering into a designated geographic area except upon terms the Department finds appropriate. The terms may include consideration of the purpose of the

entry, the time of day, others accompanying the person, and advance approval by the Department;

(O) refrain from having any contact, including written or oral communications, directly or indirectly, with certain specified persons including, but not limited to, the victim or the victim's family, and report any incidental contact with the victim or the victim's family to the Department within 72 hours; refrain from entering onto the premises of, traveling past, or loitering near the victim's residence, place of employment, or other places frequented by the victim;

(P) refrain from having any contact, including written or oral communications, directly or indirectly, with particular types of persons, including but not limited to members of street gangs, drug users, drug dealers, or prostitutes;

(Q) refrain from all contact, direct or indirect, personally, by telephone, letter, or through another person, with minor children without prior identification and approval of the Department;

(R) refrain from having in his or her body the presence of alcohol or any illicit drug prohibited by the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act, unless prescribed by a physician, and submit samples of his or her breath, saliva, blood, or urine for tests to

determine the presence of alcohol or any illicit drug;

(S) not establish a dating, intimate, or sexual relationship with a person without prior written notification to the Department;

(T) neither possess or have under his or her control any material that is pornographic, sexually oriented, or sexually stimulating, or that depicts or alludes to sexual activity or depicts minors under the age of 18, including but not limited to visual, auditory, telephonic, electronic media, or any matter obtained through access to any computer or material linked to computer access use;

(U) not patronize any business providing sexually stimulating or sexually oriented entertainment nor utilize "900" or adult telephone numbers or any other sex-related telephone numbers;

(V) not reside near, visit, or be in or about parks, schools, day care centers, swimming pools, beaches, theaters, or any other places where minor children congregate without advance approval of the Department and report any incidental contact with minor children to the Department within 72 hours;

(W) not establish any living arrangement or residence without prior approval of the Department;

(X) not publish any materials or print any advertisements without providing a copy of the proposed publications to the Department

officer and obtaining permission prior to publication;

(Y) not leave the county except with prior permission of the Department and provide the Department officer or agent with written travel routes to and from work and any other designated destinations;

(Z) not possess or have under his or her control certain specified items of contraband related to the incidence of sexually offending items including video or still camera items or children's toys;

(AA) provide a written daily log of activities as directed by the Department;

(BB) comply with all other special conditions that the Department may impose that restrict the person from high-risk situations and limit access or potential victims.

(6) A person placed on conditional release and who during the term undergoes mandatory drug or alcohol testing or is assigned to be placed on an approved electronic monitoring device may be ordered to pay all costs incidental to the mandatory drug or alcohol testing and all costs incidental to the approved electronic monitoring in accordance with the person's ability to pay those costs. The Department may establish reasonable fees for the cost of maintenance, testing, and incidental expenses related to the mandatory drug or alcohol testing and all costs incidental to approved electronic monitoring.

(Source: P.A. 93-616, eff. 1-1-04; 94-556, eff. 9-11-05.)

(725 ILCS 207/45)

Sec. 45. Deoxyribonucleic acid analysis requirements.

(a)(1) If a person is found to be a sexually violent person under this Act, the court shall require the person to provide a biological specimen for deoxyribonucleic acid analysis in accordance with Section 5-4-3 of the Unified Code of Corrections.

(2) The results from deoxyribonucleic acid analysis of a specimen under paragraph (a)(1) of this Section may be used only as authorized by Section 5-4-3 of the Unified Code of Corrections.

(b) The rules adopted by the Illinois Department of State Police under Section 5-4-3 of the Unified Code of Corrections are the procedures that must be followed for persons to provide specimens under paragraph (a)(1) of this Section.

(Source: P.A. 90-40, eff. 1-1-98; 91-227, eff. 1-1-00.)

(725 ILCS 207/50)

Sec. 50. Secure facility for sexually violent persons.

(a) The Department shall place a person committed to a secure facility under paragraph (b)(2) of Section 40 of this Act at a facility provided by the Department of Corrections under subsection (b) of this Section.

(b) The Department may enter into an agreement with the Department of Corrections for the provision of a secure facility for persons committed under paragraph (b)(2) of Section 40 of this Act to a facility. The Department shall operate the facility provided by the Department of Corrections under this subsection and shall provide by rule for the nature of the facility, the level of care to be provided in the facility, and the custody and discipline of persons placed in the facility. The facility operated under this Section shall not be subject to the provisions of the Mental Health and Developmental Disabilities Code.

(c) For the purposes of Section 3-6-4 of the Unified Code of Corrections, a person held in detention in a secure facility or committed as a sexually violent person and held in a secure facility shall be considered a "committed person", as that term is used in Section 3-6-4 of the Unified Code of Corrections.

(Source: P.A. 90-40, eff. 1-1-98; 90-793, eff. 8-14-98.)

(725 ILCS 207/55)

Sec. 55. Periodic reexamination; report.

(a) If a person has been committed under Section 40 of this Act and has not been discharged under Section 65 of this Act, the Department shall submit a written report to the court on his or her mental condition within 6 months after an initial commitment under Section 40 and then at least once every 12 months thereafter for the purpose of determining whether the person has made sufficient progress to be conditionally released or discharged. At the time of a reexamination under this Section,

the person who has been committed may retain or, if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her.

(b) Any examiner conducting an examination under this Section shall prepare a written report of the examination no later than 30 days after the date of the examination. The examiner shall place a copy of the report in the person's health care records and shall provide a copy of the report to the court that committed the person under Section 40. The examination shall be conducted in conformance with the standards developed under the Sex Offender Management Board Act and by an evaluator approved by the Board.

(c) Notwithstanding subsection (a) of this Section, the court that committed a person under Section 40 may order a reexamination of the person at any time during the period in which the person is subject to the commitment order. Any examiner conducting an examination under this Section shall prepare a written report of the examination no later than 30 days after the date of the examination.

(d) Petitions for discharge after reexamination must follow the procedure outlined in Section 65 of this Act.

(Source: P.A. 93-616, eff. 1-1-04; 93-885, eff. 8-6-04.)

(725 ILCS 207/60)

Sec. 60. Petition for conditional release.

(a) Any person who is committed for institutional care in a secure facility or other facility under Section 40 of this Act may petition the committing court to modify its order by authorizing conditional release if at least 6 months have elapsed since the initial commitment order was entered, the most recent release petition was denied or the most recent order for conditional release was revoked. The director of the facility at which the person is placed may file a petition under this Section on the person's behalf at any time.

(b) If the person files a timely petition without counsel, the court shall serve a copy of the petition on the Attorney General or State's Attorney, whichever is applicable and, subject to paragraph (c)(1) of Section 25 of this Act, appoint counsel. If the person petitions through counsel, his or her attorney shall serve the Attorney General or State's Attorney, whichever is applicable.

(c) Within 20 days after receipt of the petition, the court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate, who shall examine the mental condition of the person and furnish a written report of the examination to the court within 30 days after appointment. The examiners shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records and patient health care records. If any such examiner believes that the person is appropriate for conditional release, the examiner shall report on the type of treatment and services that the person may need while in the community on conditional release. The State has the right to have the person evaluated by

experts chosen by the State. Any examination or evaluation conducted under this Section shall be in conformance with the standards developed under the Sex Offender Management Board Act and conducted by an evaluator approved by the Board. The court shall set a probable cause hearing as soon as practical after the examiner's report is filed. If the court determines at the probable cause hearing that cause exists to believe that it is not substantially probable that the person will engage in acts of sexual violence if on release or conditional release, the court shall set a hearing on the issue.

(d) The court, without a jury, shall hear the petition within 30 days after the report of the court-appointed examiner is filed with the court, unless the petitioner waives this time limit. The court shall grant the petition unless the State proves by clear and convincing evidence that the person has not made sufficient progress to be conditionally released. In making a decision under this subsection, the court must consider the nature and circumstances of the behavior that was the basis of the allegation in the petition under paragraph (b)(1) of Section 15 of this Act, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself and what arrangements are available to ensure that the person has access to and will participate in necessary treatment.

(e) Before the court may enter an order directing conditional release to a less restrictive alternative it must find the following: (1) the person will be treated by a Department approved treatment provider, (2) the treatment provider has presented a specific

course of treatment and has agreed to assume responsibility for the treatment and will report progress to the Department on a regular basis, and will report violations immediately to the Department, consistent with treatment and supervision needs of the respondent, (3) housing exists that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the Department if the person leaves the housing to which he or she has been assigned without authorization, (4) the person is willing to or has agreed to comply with the treatment provider, the Department, and the court, and (5) the person has agreed or is willing to agree to comply with the behavioral monitoring requirements imposed by the court and the Department.

(f) If the court finds that the person is appropriate for conditional release, the court shall notify the Department. The Department shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The plan shall address the person's need, if any, for supervision, counseling, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. The Department may contract with a county health department, with another public agency or with a private agency to provide the treatment and services identified in the plan. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 60 days after the court finding that the person is appropriate

for conditional release, unless the Department and the person to be released request additional time to develop the plan.

(g) The provisions of paragraphs (b)(4), (b)(5), and (b)(6) of Section 40 of this Act apply to an order for conditional release issued under this Section.

(Source: P.A. 92-415, eff. 8-17-01; 93-616, eff. 1-1-04; 93-885, eff. 8-6-04.)

(725 ILCS 207/65)

Sec. 65. Petition for discharge; procedure.

(a)(1) If the Secretary determines at any time that a person committed under this Act is no longer a sexually violent person, the Secretary shall authorize the person to petition the committing court for discharge. The person shall file the petition with the court and serve a copy upon the Attorney General or the State's Attorney's office that filed the petition under subsection (a) of Section 15 of this Act, whichever is applicable. The court, upon receipt of the petition for discharge, shall order a hearing to be held within 45 days after the date of receipt of the petition.

(2) At a hearing under this subsection, the Attorney General or State's Attorney, whichever filed the original petition, shall represent the State and shall have the right to have the petitioner examined by an expert or professional person of his or her choice. The examination shall be conducted in conformance with the standards developed under the Sex Offender Management

Board Act and by an evaluator approved by the Board. The committed person or the State may elect to have the hearing before a jury. The State has the burden of proving by clear and convincing evidence that the petitioner is still a sexually violent person.

(3) If the court or jury is satisfied that the State has not met its burden of proof under paragraph (a)(2) of this Section, the petitioner shall be discharged from the custody or supervision of the Department. If the court is satisfied that the State has met its burden of proof under paragraph (a)(2), the court may proceed under Section 40 of this Act to determine whether to modify the petitioner's existing commitment order.

(b)(1) A person may petition the committing court for discharge from custody or supervision without the Secretary's approval. At the time of an examination under subsection (a) of Section 55 of this Act, the Secretary shall provide the committed person with a written notice of the person's right to petition the court for discharge over the Secretary's objection. The notice shall contain a waiver of rights. The Secretary shall forward the notice and waiver form to the court with the report of the Department's examination under Section 55 of this Act. If the person does not affirmatively waive the right to petition, the court shall set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the person is still a sexually violent person. If a person does not file a petition for discharge, yet fails to waive the right to petition

under this Section, then the probable cause hearing consists only of a review of the reexamination reports and arguments on behalf of the parties. The committed person has a right to have an attorney represent him or her at the probable cause hearing, but the person is not entitled to be present at the probable cause hearing. The probable cause hearing under this Section must be held within 45 days of the filing of the reexamination report under Section 55 of this Act.

(2) If the court determines at the probable cause hearing under paragraph (b)(1) of this Section that probable cause exists to believe that the committed person is no longer a sexually violent person, then the court shall set a hearing on the issue. At a hearing under this Section, the committed person is entitled to be present and to the benefit of the protections afforded to the person under Section 25 of this Act. The committed person or the State may elect to have a hearing under this Section before a jury. A verdict of a jury under this Section is not valid unless it is unanimous. The Attorney General or State's Attorney, whichever filed the original petition, shall represent the State at a hearing under this Section. The State has the right to have the committed person evaluated by experts chosen by the State. The examination shall be conducted in conformance with the standards developed under the Sex Offender Management Board Act and by an evaluator approved by the Board. At the hearing, the State has the burden of proving by clear and convincing evidence that the committed person is still a sexually violent person.

(3) If the court or jury is satisfied that the State has not met its burden of proof under paragraph (b)(2) of this Section, the person shall be discharged from the custody or supervision of the Department. If the court or jury is satisfied that the State has met its burden of proof under paragraph (b)(2) of this Section, the court may proceed under Section 40 of this Act to determine whether to modify the person's existing commitment order.

(Source: P.A. 92-415, eff. 8-17-01; 93-616, eff. 1-1-04.)

(725 ILCS 207/70)

Sec. 70. Additional discharge petitions. In addition to the procedures under Section 65 of this Act, a committed person may petition the committing court for discharge at any time, and the court must set the matter for a probable cause hearing; however, if a person has previously filed a petition for discharge without the Secretary's approval and the court determined, either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person was still a sexually violent person, then the court shall deny any subsequent petition under this Section without a hearing unless the petition contains facts upon which a court could find that the condition of the person had so changed that a hearing was warranted. If the court finds that a hearing is warranted, the court shall set a probable cause hearing and continue proceedings under paragraph (b)(2) of Section 65, if appropriate. If the person has not previously filed a petition for

discharge without the Secretary's approval, the court shall set a probable cause hearing and continue proceedings under paragraph (b)(2) of Section 65, if appropriate.

(Source: P.A. 90-40, eff. 1-1-98; 91-227, eff. 1-1-00.)

(725 ILCS 207/75)

Sec. 75. Notice concerning conditional release, discharge, escape, death, or court-ordered change in the custody status of a detainee or civilly committed sexually violent person.

(a) As used in this Section, the term:

(1) "Act of sexual violence" means an act or attempted act that is a basis for an allegation made in a petition under paragraph (b)(1) of Section 15 of this Act.

(2) "Member of the family" means spouse, child, sibling, parent, or legal guardian.

(3) "Victim" means a person against whom an act of sexual violence has been committed.

(b) If the court places a civilly committed sexually violent person on conditional release under Section 40 or 60 of this Act or discharges a person under Section 65, or if a detainee or civilly committed sexually violent person escapes, dies, or is subject to any court-ordered change in custody status of the detainee or sexually violent person, the Department shall make a reasonable attempt, if he or she can be found, to notify all of the following who have requested notification under this Act or under the Rights of Crime Victims and Witnesses Act:

(1) Whichever of the following persons is appropriate in accordance with the provisions of subsection (a)(3):

(A) The victim of the act of sexual violence.

(B) An adult member of the victim's family, if the victim died as a result of the act of sexual violence.

(C) The victim's parent or legal guardian, if the victim is younger than 18 years old.

(2) The Department of Corrections or the Department of Juvenile Justice.

(c) The notice under subsection (b) of this Section shall inform the Department of Corrections or the Department of Juvenile Justice and the person notified under paragraph (b)(1) of this Section of the name of the person committed under this Act and the date the person is placed on conditional release, discharged, or if a detainee or civilly committed sexually violent person escapes, dies, or is subject to any court-ordered change in the custody status of the detainee or sexually violent person. The Department shall send the notice, postmarked at least 60 days before the date the person committed under this Act is placed on conditional release, discharged, or if a detainee or civilly committed sexually violent person escapes, dies, or is subject to any court-ordered change in the custody status of the detainee or sexually violent person, unless unusual circumstances do not permit advance written notification, to the Department of Corrections or the Department of Juvenile Justice and the last-known address of the person notified under paragraph (b)(1) of this Section.

(d) The Department shall design and prepare cards for persons specified in paragraph (b)(1) of this Section to send to the Department. The cards shall have space for these persons to provide their names and addresses, the name of the person committed under this Act and any other information the Department determines is necessary. The Department shall provide the cards, without charge, to the Attorney General and State's Attorneys. The Attorney General and State's Attorneys shall provide the cards, without charge, to persons specified in paragraph (b)(1) of this Section. These persons may send completed cards to the Department. All records or portions of records of the Department that relate to mailing addresses of these persons are not subject to inspection or copying under Section 3 of the Freedom of Information Act.

(Source: P.A. 94-696, eff. 6-1-06; 95-896, eff. 1-1-09.)

(725 ILCS 207/80)

Sec. 80. Applicability. This Act applies to a sexually violent person regardless of whether the person engaged in acts of sexual violence before, on, or after the effective date of this Act.

(Source: P.A. 90-40, eff. 1-1-98.)

(725 ILCS 207/90)

Sec. 90. Committed persons ability to pay for services. Each person committed or detained under this Act who receives services provided directly or funded by the Department and the estate of that

person is liable for the payment of sums representing charges for services to the person at a rate to be determined by the Department. Services charges against that person take effect on the date of admission or the effective date of this Section. The Department in its rules may establish a maximum rate for the cost of services. In the case of any person who has received residential services from the Department, whether directly from the Department or through a public or private agency or entity funded by the Department, the liability shall be the same regardless of the source of services. When the person is placed in a facility outside the Department, the facility shall collect reimbursement from the person. The Department may supplement the contribution of the person to private facilities after all other sources of income have been utilized; however the supplement shall not exceed the allowable rate under Title XVIII or Title XIX of the Federal Social Security Act for those persons eligible for those respective programs. The Department may pay the actual costs of services or maintenance in the facility and may collect reimbursement for the entire amount paid from the person or an amount not to exceed the maximum. Lesser or greater amounts may be accepted by the Department when conditions warrant that action or when offered by persons not liable under this Act. Nothing in this Section shall preclude the Department from applying federal benefits that are specifically provided for the care and treatment of a disabled person toward the cost of care provided by a State facility or private agency. The Department may investigate the financial condition of each person committed under this Act, may make determinations of the ability of each such person to pay sums

representing services charges, and for those purposes may set a standard as a basis of judgment of ability to pay. The Department shall by rule make provisions for unusual and exceptional circumstances in the application of that standard. The Department may issue to any person liable under this Act a statement of amount due as treatment charges requiring him or her to pay monthly, quarterly, or otherwise as may be arranged, an amount not exceeding that required under this Act, plus fees to which the Department may be entitled under this Act.

(a) Whenever an individual is covered, in part or in whole, under any type of insurance arrangement, private or public, for services provided by the Department, the proceeds from the insurance shall be considered as part of the individual's ability to pay notwithstanding that the insurance contract was entered into by a person other than the individual or that the premiums for the insurance were paid for by a person other than the individual. Remittances from intermediary agencies under Title XVIII of the Federal Social Security Act for services to committed persons shall be deposited with the State Treasurer and placed in the Mental Health Fund. Payments received from the Department of Healthcare and Family Services under Title XIX of the Federal Social Security Act for services to those persons shall be deposited with the State Treasurer and shall be placed in the General Revenue Fund.

(b) Any person who has been issued a Notice of Determination of sums due as services charges may petition the Department for a review of that determination. The petition must be in writing and filed with the Department within 90 days from the

date of the Notice of Determination. The Department shall provide for a hearing to be held on the charges for the period covered by the petition. The Department may after the hearing, cancel, modify, or increase the former determination to an amount not to exceed the maximum provided for the person by this Act. The Department at its expense shall take testimony and preserve a record of all proceedings at the hearing upon any petition for a release from or modification of the determination. The petition and other documents in the nature of pleadings and motions filed in the case, a transcript of testimony, findings of the Department, and orders of the Secretary constitute the record. The Secretary shall furnish a transcript of the record to any person upon payment of 75¢ per page for each original transcript and 25¢ per page for each copy of the transcript. Any person aggrieved by the decision of the Department upon a hearing may, within 30 days thereafter, file a petition with the Department for review of the decision by the Board of Reimbursement Appeals established in the Mental Health and Developmental Disabilities Code. The Board of Reimbursement Appeals may approve action taken by the Department or may remand the case to the Secretary with recommendation for redetermination of charges.

(c) Upon receiving a petition for review under subsection (b) of this Section, the Department shall thereupon notify the Board of Reimbursement Appeals which shall render its decision thereon within 30 days after the petition is filed and certify such decision to the Department. Concurrence of a majority of the Board is necessary in any such decision. Upon request of the Department, the State's Attorney of the county in which a client who is liable

under this Act for payment of sums representing services charges resides, shall institute appropriate legal action against any such client, or within the time provided by law shall file a claim against the estate of the client who fails or refuses to pay those charges. The court shall order the payment of sums due for services charges for such period or periods of time as the circumstances require. The order may be entered against any defendant and may be based upon the proportionate ability of each defendant to contribute to the payment of sums representing services charges including the actual charges for services in facilities outside the Department where the Department has paid those charges. Orders for the payment of money may be enforced by attachment as for contempt against the persons of the defendants and, in addition, as other judgments for the payment of money, and costs may be adjudged against the defendants and apportioned among them.

(d) The money collected shall be deposited into the Mental Health Fund.

(Source: P.A. 95-331, eff. 8-21-07.)

(725 ILCS 207/99)

Sec. 99. Effective date. This Act takes effect January 1, 1998.

(Source: P.A. 90-40, eff. 1-1-98.)

**APPENDIX J**

No. 106400

# In The
# Supreme Court of Illinois

*In re* DETENTION OF BRAD LIEBERMAN,
The People of the State of Illinois
*Appellee,*
v.
BRAD LIEBERMAN,
*Petitioner-Respondent*

Petition for Leave to Appeal from the Illinois Appellate Court, First District, Sixth Division (No. 1-06-1272) (Justices McBride, J. Gordon, and O'Malley). There heard on appeal from the Circuit Court of Cook County, (No. 00 CR 8000101), the Honorable Dennis J. Porter, Judge Presiding.

**PETITION OF BRAD LIEBERMAN FOR APPEAL AS A MATTER OF RIGHT AND ALTERNATIVELY FOR LEAVE TO APPEAL**

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## PRAYER FOR LEAVE TO APPEAL

Brad Lieberman ("Lieberman" or "Respondent"), pursuant to Illinois Supreme Court Rules 315 and 317, respectfully petitions this Court for appeal as a matter of right, and alternatively petitions for leave to appeal, from the judgment of the Illinois Appellate Court, First District. That judgment affirmed the commitment order, entered after a jury trial, by the Circuit Court of Cook County, pursuant to the Sexually Violent Persons Commitment Act, 725 ILCS 207/1 ("SVPCA").

## STATEMENT OF JURISDICTION

On September 28, 2007, the Illinois Appellate Court, First District, issued a published Opinion ("Opinion") affirming the final judgment entered by the Circuit Court of Cook County after a jury verdict and a dispositional hearing. A true and correct copy of the Opinion (as corrected by the Appellate Court) is found in the Appendix, pages A1-A39. A petition for rehearing was timely filed on October 19, 2007 and denied on March 20, 2008. (A40).

## INTRODUCTION

This Court should look beyond the unpopularity of Respondent's cause to address the important constitutional and procedural issues the Appellate Court declined to address. Despite a lengthy recitation of the evidence presented at trial, the published Opinion does not address the important constitutional issues presented. Accordingly, Illinois law is now inconsistent with the requirements of due process set forth in numerous United States Supreme Court decisions and decisions of this Court. The Appellate Court effectively altered the controlling

legal standard for all SVPCA cases. The Opinion should be reviewed and ultimately reversed by this Court.

This case raises constitutional questions that support mandatory review under Rule 317, or, at the very least, merit discretionary review under Rule 315. Recent United States Supreme Court precedent holds that civil commitment of past sex offenders after their terms of imprisonment end is not permitted in the absence of substantial proof that the past offender *presently* suffers from "serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 107, 122 S. Ct. 867, 868 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 357, 117 S. Ct. 2072, 2080 (1997). Neither a predisposition to violence nor "dangerousness" is enough to support commitment. *Hendricks,* 521 U.S. at 357, 117 S. Ct. at 2080.

The Appellate Court Opinion did not acknowledge the foregoing precedent despite uncontroverted trial evidence showing beyond doubt that Respondent does not *presently* suffer from serious difficulty controlling behavior. Respondent's current volitional control was the central issue raised on appeal, and it was discussed in an eight-page argument in Respondent's opening brief. (A290-97). Instead of addressing that issue, the Appellate Court incorrectly analyzed the case as a battle of experts, stating that "the jury was free to accept or reject as much or as little of her testimony as it saw fit." (A 23). There was no battle of experts on the issue of volitional control because neither of the State's two experts testified that Respondent presently has serious difficulty controlling his behavior. (A146-52; A246-47). Thus, there was no evidence for the jury to accept or reject on this essential element of proof. This Court should

grant Respondent's Petition to address the important constitutional issues presented by this case and to resolve the irreconcilable conflict with controlling federal precedent that the Opinion has created.

This Court should also grant Respondent's Petition to review the evidentiary and other procedural rules applied in the nominally "civil" commitment proceedings under the SVPCA. Respondent suffered overwhelming, incurable prejudice because the trial court used the rule of *Wilson v. Clark*, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981) as a pretext to admit otherwise inadmissible and highly inflammatory out-of-court statements. The Appellate Court's approval in its published Opinion of the prejudicial misuse of hearsay evidence creates a conflict between SVPCA procedure and well-settled case law addressing similar evidentiary issues. Respondents who face potentially lifelong civil commitment deserve evidentiary safeguards that are at least as strict as those followed in criminal trials. The inflammatory evidence of Respondent's past crimes and other alleged offenses was used in a way that never would have been permitted in any other type of case, civil or criminal, where evidence of past convictions and offenses is strictly limited. Repeated limiting instructions exacerbated the problem, encouraging the jury to use the out-of-court statements as a basis for commitment.

As further grounds for appeal as a matter of right, Respondent submits that the Appellate Court misperceived the Respondent's argument based on undisputed facts that his legal release date preceded the effective date of the SVPCA on January 1, 1998. Accordingly, the Appellate Court applied the SVPCA as an *ex post facto* law, in violation of the United

States and Illinois Constitutions.

**POINTS RELIED UPON FOR REVERSAL**

1. The Appellate Court's refusal to address controlling constitutional precedent, including without limitation, *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867 (2002) and *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), alters the controlling legal standard for civil commitment and creates a question of constitutional law that justifies appeal as a matter of right under Supreme Court Rule 317. The due process clauses of the United States and Illinois Constitutions do not permit commitment where, as here, the uncontroverted evidence in the record shows that Respondent does not currently lack volitional control over his behavior. The constitutional error that occurred here is likely to be repeated in other SVPCA cases, making review by this Court essential.

**APPENDIX K**

**No. 06-1272**

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**IN THE**
**APPELLATE COURT OF ILLINOIS**
**FIRST JUDICIAL DISTRICT**

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|---|---|
| IN RE: THE DETENTION OF | ) |
| | ) *APPEAL FROM THE* |
| BRAD LIEBERMAN, | ) *CIRCUIT COURT OF* |
| | ) *COOK COUNTY* |
| | ) |
| RESPONDENT-APPELLANT. | ) NO. 00 CR 8000101 |
| | ) HON. DENNIS J. PORTER, |
| | ) JUDGE PRESIDING |

---

**BRIEF OF RESPONDENT-APPELLANT**
**BRAD LIEBERMAN**

**ORAL ARGUMENT REQUESTED**

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* * *

## A. THE JUDGMENT VIOLATES CONSTITUTIONAL LIMITS ON CIVIL COMMITMENT.

The State's evidence fell far short of meeting constitutional and statutory requirements for civil commitment. In *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997) and *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867 (2002), the United States Supreme Court addressed the constitutional limits for civil commitment of convicted sex offenders after their sentence of imprisonment for their criminal offenses has been served. The Illinois Supreme Court applied *Hendricks* and *Crane* to the Illinois SVPCA in *In re Detention of Varner*, 207 Ill. 2d 425, 426, 800 N.E.2d 794, 795 (2003) and *People v. Masterson*, 207 Ill. 2d 305, 317, 798 N.E.2d 735, 742 (2003). All of these decisions are clear in holding that civil commitment of a convicted sex offender cannot be justified in the absence of compelling proof that the respondent suffers from a serious inability to control dangerous behavior.

### 1. United States Supreme Court Cases.

In *Hendricks*, the United States Supreme Court considered whether the Kansas Sexually Violent Predator Act ("Kansas SVP Act") met minimum standards of due process. Noting that in narrow circumstances, "the forcible civil detainment of people who are unable to control their behavior" and thereby pose a danger to the public may be permitted, the Supreme Court held that involuntary civil commitment of convicted sex offenders must be limited to those "who suffer from a volitional impairment rendering them dangerous beyond their

control." *Hendricks*, 521 U.S. at 357-58. Due process in this context has three essential requirements: "[P]roper procedures and evidentiary standards," a finding that the respondent is dangerous to himself or others, and proof of "some additional factor, such as a 'mental illness' or 'mental abnormality.'" The mental illness must be linked to the person's inability to control dangerous behavior. *Id.*

In *Hendricks*, the Kansas SVP Act was held to satisfy due process because it required proof that respondent suffered from a current mental abnormality, defined as a "congenital or acquired condition affecting emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *Id.* at 352; KAN. STAT. ANN. § 59-29(a)(02)(b) (1994). The Supreme Court reasoned that the Kansas SVP Act "requires proof of more than a mere predisposition to violence." *Hendricks* 521 U.S. at 357. A finding of dangerousness alone is likewise "not a sufficient ground upon which to justify indefinite involuntary commitment." *Id.* at 358. The Kansas SVP Act satisfied due process because it required more than a predisposition or dangerousness. It limited civil commitment to those who suffer from a volitional impairment rendering them dangerous beyond their control. The state must prove that the respondent's mental abnormality "makes it difficult, if not impossible, for [him] to control his dangerous behavior." *Id.*

In *Hendricks*, the Supreme Court explained that Hendricks' "admitted lack of volitional control, coupled with a prediction of future dangerousness

adequately distinguishes *Hendricks* from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* at 360. The Supreme Court did not require "any particular nomenclature" to describe the necessary mental disorder as long as the statute adopted acceptable criteria "relating to an individual's inability to control his dangerousness." *Id.* at 359-60.

After the Kansas Supreme Court again struck down the Kansas SVP Act, the Supreme Court revisited similar issues in Crane. Crane, 534 U.S. at 410-11. The Supreme Court explained that due process does not require "*total* or *complete* lack-of-control," but civil commitment cannot be justified in the absence of "any lack-of control determination." *Id.* at 412 (emphasis in original). Due process requires, at a minimum, "proof of serious difficulty in controlling behavior." *Id.* at 407. The Kansas SVP Act's requirement of "a special and serious lack of ability to control behavior" satisfied due process. *Id.* at 413.

The *Crane* court noted that the *Hendricks* decision "underscored the constitutional importance" of distinguishing sexual offenders who are properly subject to civil commitment from other criminals—including dangerous ones—who do not meet the test for civil commitment. "That distinction is necessary lest 'civil commitment become a mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment." *Id.* at 412 (quoting *Hendricks*).

The foregoing cases rest upon the long-established principle that past criminal conduct, without more, cannot justify civil commitment. *See Foucha v.*

*Louisiana*, 504 U.S. 71, 82-83, 112 S. Ct. 1780, 1786-87 (1992). Because the civil commitment process is not intended as a substitute for the criminal justice system, the Supreme Court in *Foucha* refused to allow civil commitment based solely upon past criminal conduct, reasoning as follows:

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.*

*Id.* at 82-83 (emphasis added); *see also Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("If . . . civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not

suffice to validate it."); *Allen v. Illinois*, 478 U.S. 364, 380, 106 S. Ct. 2988, 2998 (1986) (Stevens, J., dissenting) (warning that broad interpretation of Illinois Sexually Dangerous Persons Act might encourage State to create "an entire corpus of 'dangerous person' statutes to shadow its criminal code" and that "[i]ndeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and 'criminal propensities,' and constitutional protections for criminal defendants would be simply inapplicable."); Mari M. Presley, *Jimmy Ryce Involuntary Civil Commitment For Sexually Violent Predators' Treatment And Care Act: Replacing Criminal Justice With Civil Commitment*, 26 FLA. ST. U. L. REV. 487, 496 (1999) ("[S]eeking redress through civil commitment . . . strictly undermines our system of jurisprudence. Constitutional protections afforded those who have been charged with crimes must not be so easily circumvented.").

Supreme Court, U.S.
FILED
MAR 23 2009
OFFICE OF THE CLERK

No. 08-807

# In the Supreme Court of the United States

BRAD LIEBERMAN, PETITIONER,

*v.*

ILLINOIS, RESPONDENT.

**On Petition for a Writ of Certiorari to the Appellate Court of Illinois**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether this Court should review the state appellate court's judgment affirming a jury verdict that petitioner suffers from a mental disorder predisposing him to engage in, and making it substantially probable that he will engage in, future acts of sexual violence, where ample record evidence supports the jury's verdict and the state appellate court properly applied federal due process standards in sustaining that verdict.

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## BRIEF IN OPPOSITION

The certiorari petition should be denied. Petitioner alleges no split in authority. And aside from generalized attacks on the practice of civilly committing sex offenders, petitioner's challenge is to the sufficiency of the evidence supporting his commitment. He claims that all of the evidence at trial demonstrated his "full volitional control," and that he was committed notwithstanding this evidence because the Illinois courts refused to apply federal due process principles. Pet. i, 1, 2, 12. Both of these contentions are false. In fact: (1) jurors heard ample evidence that petitioner lacks volitional control, and (2) the appellate court applied precisely the federal due process standard that petitioner claims was ignored. In short, the petition not only seeks mere error correction on its own terms, but also mischaracterizes the record and the appellate court's decision in an effort to manufacture the error it seeks to correct. Further review by this Court is unwarranted.

## STATEMENT

A. *The Illinois Legal Framework.* Under Illinois's Sexually Violent Persons Commitment Act (SVPCA), a "sexually violent person" is one "who has been convicted of a sexually violent offense * * * and who is dangerous because he * * * suffers from a mental disorder that makes it substantially probable that [he] will engage in acts of sexual violence." 725 Ill. Comp. Stat. § 207/5(f). In turn, proving a "mental disorder" requires a showing of "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." 725 Ill. Comp. Stat. § 207/5(b).

Once an individual is committed, Illinois law authorizes that commitment to persist only "until such time as [he] is no longer a sexually violent person." 725 Ill. Comp. Stat. 207/40(a). The individual is entitled to a periodic reexamination of his mental condition—six months after the initial commitment

and at least once every twelve months thereafter—to determine whether he has made sufficient progress to qualify for conditional release or discharge. 725 Ill. Comp. Stat. 207/55(a). Moreover, the Act requires the Department of Human Services (DHS) to notify the committed person of his right to petition the court for discharge, and provides that even if no discharge petition is filed, the court must set a probable cause hearing to determine whether facts exist warranting a further hearing on whether the person is still sexually violent. 725 Ill. Comp. Stat. 207/65(b)(1). Indeed, a committed person may petition the court for discharge "at any time" under § 70, as well as with the Secretary's authorization under § 65. 725 Ill. Comp. Stat. 207/70; 725 Ill. Comp. Stat. 207/65.

B. *Petitioner's Rape Convictions And Incarceration.* In 1980, petitioner was convicted in Cook County, Illinois, of six counts of rape and one count of attempted rape. Pet. App. 2a. In that same year, petitioner was convicted of one count of rape and one count of attempted rape in Lake County, Illinois. *Ibid.* Petitioner was sentenced to concurrent terms of imprisonment, the longest of which was forty years. *Ibid.*

Petitioner engaged in sexual and other misconduct while in prison. Not only was he discovered in the visitor's bathroom engaged in sexual activity with a woman, Pet. App. 5a, but he was also found to have written unsolicited letters to several women. Tr. Vol. IV at 102-104. In one case, he enclosed his photograph in a letter to a woman he had seen on television, *id.* at 102-03, in another he wrote to a woman whose picture he had seen in a newspaper—telling her "how beautiful she was," "how sweet and how hot," and "how lucky he would be to have a friend like her," *id.* at 103—and in yet another instance he sent a profanity-laden letter to a woman who failed to attend a prison picnic. *Id.* at 104. The women objected to receiving his letters. *Ibid.* Meanwhile, prison officials found petitioner in possession of cannabis, he tested positive for morphine,

and he was "disciplined five times for drugs or drug paraphernalia." Pet. App. 4a-5a.

C. *Petitioner's Commitment Proceedings.* In January 2000, the State filed a petition seeking petitioner's commitment under the SVPCA, alleging that petitioner had been convicted of a number of sexually violent offenses and was dangerous to others because his mental disorders created a substantial probability that he would engage in future acts of sexual violence. Pet. App. 2a-3a.

At trial, the State presented the testimony of two expert witnesses: Dr. Jacqueline Buck and Dr. Barry Leavitt. Dr. Buck, a clinical psychologist and special evaluator for the Illinois Department of Corrections (IDOC), diagnosed petitioner "with paraphilia not otherwise specified, sexually attracted to nonconsenting persons (paraphilia NOS)," cannabis abuse, and antisocial and narcissistic personality disorders. Pet. App. 6a-7a. Using four actuarial tools, Dr. Buck assessed petitioner's risk of committing future acts of sexual violence. Petitioner scored "very high" on the Minnesota Sex Offender Screening Tool Revised (MnSOSTR-R); "extremely high" on the Static-99; "high" on the Violence Risk Appraisal Guide (V-RAG); and "extremely high" on the Sex Offender Risk Appraisal Guide (SORAG). Pet. App. 7a. Based on both her clinical judgment and the actuarial test results, Dr. Buck concluded that petitioner was at a high risk of sexually reoffending. Pet. App. 8a.

In forming her opinion, Dr. Buck also considered petitioner's criminal history, including the facts of his rape convictions, as well as other cases in which petitioner was arrested and charged with a sexually violent offense. Pet. App. 3a-4a. Moreover, it was relevant that petitioner refused to discuss his crimes with Dr. Buck, characterized himself as a victim of "overzealous police officers" and "mistaken identity," and attributed his multiple rape convictions to "just being in the wrong place at the wrong time." Pet. App. 4a. In addition, Dr. Buck took account of evidence of

petitioner's behavior while in prison, including his drug use, the incident in which he engaged in sexual conduct with a woman in a visitor's bathroom, and his unsolicited letters to women. Pet. App. 4a-5a. Dr. Buck also considered that, while in DHS custody pending trial on the commitment petition, petitioner exhibited "angry, hostile, aggressive behaviors." Pet. App. 5a.

Dr. Buck was unable to find any mitigating factors, as petitioner refused to participate in any of the sex offender treatment offered by DHS. Pet. App. 7a-8a. And because petitioner "scored as a psychopath," he did not exhibit the usual pattern of decreased crime corresponding with increased age. Pet. App. 8a.

As the appellate court summarized her testimony, Dr. Buck thus concluded that petitioner "suffers from mental disorders that are both congenital and acquired, affect his emotional and volitional capacity, and predispose him to commit future acts of sexual violence." *Ibid.* Accordingly, it is substantially probable that petitioner will continue to commit acts of sexual violence if released into the community. *Ibid.*

Counsel for petitioner then cross-examined Dr. Buck for several days, and the petition relies on an excerpt from the third day of this examination. See Pet. 4-5. Dr. Buck testified on that day that professionals in her field do not measure volitional control as "high, low, up, [or] down," explaining that she was unaware of any way to measure volitional capacity. Pet. App. 11a. And she distinguished between petitioner's mental disorders, which "impact his emotions and thinking to the extent that he is predisposed to commit acts of sexual violence," and the question of "[w]hether he chooses to do those things or not," the latter being "where the volitional control comes in." Tr. Vol. VII at 103. Dr. Buck reserved a diagnosis of complete lack of volition for persons who are off of their medication for serious mental illnesses such as schizophrenia and manic depression. Pet. App. 12a. But she was clear that petitioner's mental

disorders do "impact his emotional and volitional control," "warp his perceptions and his feelings," "allow him to exhibit sexually assaulting behavior," and "color his viewpoint of the world * * * so that it makes it easy for him to choose to rape somebody." Tr. Vol. VII at 103, 117.

Dr. Leavitt, the State's second expert, testified that petitioner suffers from: (1) paraphilia NOS; (2) antisocial personality disorder; (3) narcissistic personality disorder; and (4) cannabis abuse within a controlled environment. Pet. App. 12a. Petitioner's paraphilia, a congenital or acquired disorder, is the primary predisposing condition compelling him to commit sexually violent acts; the other disorders compound the problem by making it easier for him to engage in sexually violent behavior. *Ibid.* Dr. Leavitt explained that petitioner's sexual behavior is not merely driven by impulse, but is "highly planned," "consistent [with] someone who is compelled to engage in this type of sexually deviant behavior." Tr. Vol. IX at 62. Dr. Leavitt found a substantial probability that petitioner will commit future acts of sexual violence unless he participates in appropriate treatment. Pet. App. 13a. And while Dr. Leavitt acknowledged that petitioner has controlled his impulses at times—*e.g.*, he did "not rape[] anyone else that we're aware of" while incarcerated—Dr. Leavitt made clear that petitioner is not always able to do so. Tr. Vol. IX at 179.

Like Dr. Buck, Dr. Leavitt also explained how he arrived at his diagnoses, relating that petitioner qualified for a diagnosis of paraphilia NOS because, among other things, he was identified by sixteen women as having committed, or attempted to commit, sexually violent offenses against them, over half of which cases resulted in convictions. Pet. App. 13a. Dr. Leavitt also used actuarial instruments to conduct a risk assessment and measure petitioner's likelihood of reoffending. *Ibid.* Petitioner scored in the "high risk" category on the Static-99 and the MnSOSTR-R, both of which actually underestimate a subject's future risk of reoffending. *Ibid.* The actuarial testing thus

confirmed Dr. Leavitt's clinical judgment that petitioner was substantially likely to commit future acts of sexual violence if released into the community. Pet. App. 13a-14a.

D. *The Jury Verdict And Appellate Review.* In February 2006, the jury rendered a verdict finding petitioner to be a sexually violent person. Pet. App. 55a-56a. Following a hearing, the court committed petitioner to DHS custody for institutional care in a secure facility until further order of the court. Pet. App. 53a-54a.

On September 28, 2007, the Illinois Appellate Court affirmed the trial court's judgment rejecting, among other claims, petitioner's contention that the State's evidence did not meet the constitutional and SVPCA requirements for civil commitment. Pet. App. 1a-44a. The court first explained that the SVPCA passes federal constitutional muster for, although it does not require the jury to make an explicit finding that the individual has serious difficulty controlling his sexual behavior, the statute makes such a finding essential to any verdict that the individual is a sexually violent person.[1] Pet. App. 24a (citing *In re Detention of Varner*, 800 N.E.2d 794 (Ill. 2003)). The SVPCA contains a volitional component in (1) its definition of "mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in sexual violence," and again in (2) its required finding that it is "substantially probable" that the individual will

---

[1] Petitioner's jury was instructed that "[a] sexually violent person means a person who has been convicted of a sexually violent offense and who is dangerous because he suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence," Tr. Vol. XVI at 166, and that "[m]ental disorder means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence," *id.* at 170.

engage in future acts of sexual violence. Pet. App. 24a. Accordingly, the jury must find that the individual lacks volitional control over his sexually violent behavior to conclude that he is a sexually violent person. *Ibid.*

After a thorough review of the trial record, the appellate court further concluded that there was sufficient evidence to support the jury's finding that petitioner has serious difficulty controlling his sexually violent behavior. Pet. App. 25a. Indeed, the court held that Dr. Leavitt's testimony alone was sufficient to support this conclusion, for he diagnosed petitioner with paraphilia NOS, cannabis abuse, and antisocial and narcissistic personality disorders. *Ibid.* And Dr. Leavitt testified that "petitioner's paraphilia affects his emotional and volitional capacity and predisposes him to commit future acts of sexual violence, and explained that [petitioner's] other disorders act as disinhibiting influences that make it easier for [petitioner] to commit sexually violent acts." Pet. App. 24a-25a. Petitioner refused treatment for his paraphilia, and he has no empathy for his victims or remorse for his actions. Pet. App. 25a. Dr. Leavitt also employed actuarial instruments, which confirmed his clinical judgment that petitioner's mental disorders create a substantial probability that he will engage in future acts of sexual violence. *Ibid.* Thus, the jury could reasonably conclude from Dr. Leavitt's testimony alone that petitioner has serious difficulty controlling his sexually violent behavior. *Ibid.*

The court went on to conclude that Dr. Buck's testimony also supported the jury's finding. *Ibid.* She diagnosed petitioner with the same mental disorders diagnosed by Dr. Leavitt, and she testified that those disorders affect petitioner's emotional and volitional capacity and predispose him to commit future acts of sexual violence. *Ibid.* Petitioner refused to undergo treatment for his disorders; he lacks empathy for his victims; and he has refused to accept responsibility for his criminal offenses, blaming them on overzealous prosecutors and mistaken identity. *Ibid.* Dr. Buck

concluded that petitioner's mental disorders make it substantially probable that he will commit future acts of sexual violence. *Ibid.*

And the court specifically rejected petitioner's effort "to interpret [Dr. Buck's] testimony to mean that he is able to control his sexually violent behavior and that, in effect, he could make a volitional choice to never again commit a sexually violent offense." Pet. App. 26a. The court determined that "such a conclusion does not follow from Dr. Buck's testimony," for "[t]he mere fact that [petitioner] intentionally committed his sexual offenses does not mean that he has the volitional capacity to choose not to commit them," and "Dr. Buck never offered such an opinion and in fact testified that there is a substantial probability that [petitioner] will commit a future act of sexual violence." *Ibid.* In this regard, the court recalled Dr. Buck's testimony that petitioner's "mental disorders impact his emotional and volitional capacity and predispose him to commit acts of sexual violence," and that there is a "substantial probability that [petitioner] will commit a future act of sexual violence." *Ibid.* "Dr. Buck's statements regarding [petitioner's] volitional control, when considered in context of her entire testimony, [did] not undermine the jury's verdict that petitioner is a sexually violent person." Pet. App. 26a-27a. The mere fact that petitioner intentionally committed his sexual offenses does not mean that he has the volitional capacity to choose not to commit them. Pet. App. 26a.

The Illinois Appellate Court denied rehearing on March 20, 2008, Pet. App. 47a, and the Illinois Supreme Court denied leave to appeal on September 24, 2008. Pet. App. 46a.

## REASONS FOR DENYING THE PETITION

Petitioner begins with a sweeping challenge to civil commitment statutes generally, comparing them to "[v]igilante justice" and suggesting that States increasingly rely on civil commitment to "keep sex

offenders confined indefinitely." Pet. 9. But this is not a challenge to petitioner's own commitment, and this Court explained in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that, "far from any punitive objective, the commitment's duration is * * * linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." 521 U.S. at 363. The Illinois statute hews carefully to these purposes. The law provides for regular reassessments and permits a civil commitment to continue only "until such time as the person is no longer a sexually violent person." 725 Ill. Comp. Stat. 207/40(a); see *supra* p. 2.

Nor is it true, as petitioner seems to imply (but never actually says) that Illinois and other States indiscriminately over-commit sex offenders. In Illinois, the IDOC screens sexually violent offenders for their eligibility for commitment under the SVPCA, and only a fraction of those offenders proceed to the second stage of the screening process—an interview with a clinician. Tr. Vol. IV at 46-47. And of those interviewed, only a fraction are recommended for commitment, and an even smaller number are ultimately committed. *Ibid.*, see Pet. 9. And in any event, petitioner nowhere explains how any of this bears on *his* case.

Ultimately, what petitioner seeks is further review of the sufficiency of the evidence marshaled at his commitment trial. Specifically, he claims that Illinois courts ignored due process principles and allowed his commitment without *any* evidence that he lacks volitional control. But this claim fails on both fronts, for the appellate court evaluated petitioner's commitment using the very due process principles that petitioner accuses the court of ignoring, and jurors heard ample evidence that petitioner lacks volitional control.

A. Petitioner is wrong to claim that the Illinois appellate court "refused to acknowledge the constitutional issue" in his case and "casually ignore[d] controlling federal precedent," and he errs in

concluding that the "court's silence about the constitutional limits on civil commitment of sex offenders is tantamount to a proclamation that the limits set by *Hendricks* and [*Kansas v. Crane*, 534 U.S. 407 (2002),] need not be observed in Illinois." Pet. 2, 7. On the contrary, the appellate court thoroughly applied the due process standards set forth in *Hendricks* and *Crane*; the court simply did so with citation to later Illinois decisions expressly following those cases, rather than with citation to *Hendricks* and *Crane* themselves.

Far from "casually ignor[ing] federal precedent," Pet. 7, the appellate court's analysis of petitioner's challenge to the sufficiency of the evidence turned entirely on the federal due process rule—that the State "establish that [petitioner] has serious difficulty controlling his sexually violent behavior." Pet. App. 23a-24a; see *Crane*, 534 U.S. at 413 (holding that due process requires "proof of serious difficulty in controlling behavior" to civilly commit sex offender). The court thus quoted at length from *In re Detention of Traynoff*, 831 N.E.2d 709 (Ill. App. Ct. 2005), for its elaboration of what *Crane* requires. Pet. App. 23a (quoting *Traynoff*'s discussion of the "Constitution's safeguards," part of *Traynoff*'s analysis of *Crane*); see also Pet. App. 26a. And the appellate court expressly followed the Illinois Supreme Court's decision in *In re Detention of Varner*, 800 N.E.2d 794 (Ill. 2003), which relied on *Crane* and *Hendricks*. Pet. App. 24a; see *Varner*, 800 N.E.2d at 797-799. Other cases cited in the appellate court's opinion likewise evidence Illinois's strict adherence to the federal due process standards. See *In re Detention of Tittlebach*, 754 N.E.2d 484 (Ill. App. Ct. 2001) (cited at Pet. App. 22a-23a); *In re Commitment of Stevens*, 803 N.E.2d 1036 (Ill. App. Ct. 2004) (cited at Pet. App. 24a).

Indeed, the appellate court reached precisely the conclusion that federal due process demands to sustain a civil commitment—that the offender has "serious difficulty in controlling behavior." *Crane*, 534 U.S. at 413; see Pet. App. 23a ("we find that there was

sufficient evidence presented to establish that [petitioner] has serious difficulty controlling his sexually violent behavior"); Pet. App. 24a ("we * * * find that there was sufficient evidence presented at trial to support a finding that [petitioner] lacks volitional control over his mental disorders"); see also Pet. App. 28a ("Both [state] witnesses concluded that [petitioner's] mental disorders create a substantial probability that he will engage in future acts of sexual violence"). In short, the appellate court's opinion—and the authorities cited therein—belie petitioner's cavalier representation that after this case "the limits set by *Hendricks* and *Crane* need not be observed in Illinois." Pet. 2.

B. The appellate court thus determined that the expert testimony at petitioner's trial satisfied the due process standard, and petitioner's claim boils down to a disagreement with the appellate court over the best reading of the trial evidence. The appellate court held that the evidence was sufficient to sustain a finding that petitioner has "serious difficulty in controlling his sexually violent behavior," Pet. App. 23a—the agreed due process standard—while petitioner insists that "*there is no proof at all* of a serious difficulty with behavioral control," Pet. 11-12 (emphasis in original). This is not a challenge to the constitutional rule that the appellate court employed, for it was precisely the rule that *Crane* announced and that petitioner himself recites in his petition. It is a request for error correction based on the purported misapplication of that rule to the trial record in this case.

But even if the Court were otherwise inclined to undertake error correction, there was no error here. As the appellate court held, the State adduced ample evidence that petitioner has serious difficulty controlling his sexually violent behavior. Petitioner seizes upon and selectively emphasizes a few lines from Dr. Buck's lengthy trial testimony, claiming it as proof that jurors heard *no* evidence that he has serious difficulty controlling his sexually violent behavior. Pet. 4-5, 11; Pet. App. 22a. But the state appellate court

considered and properly rejected petitioner's sufficiency challenge, holding, among other things, that Dr. Leavitt's testimony was *alone* enough to sustain the jury's finding beyond a reasonable doubt. Pet. App. 24a. And indeed it was. Dr. Leavitt testified that petitioner's mental disorders affect his mental control, so that at times he is unable to check his impulses; he is "predispos[ed] * * * to commit future acts of sexual violence"; and there is a substantial probability that he will commit future acts of sexual violence if released. Pet. App. 24a-25a; Tr. Vol. IX at 175.

The appellate court also correctly held that Dr. Buck's testimony further demonstrated petitioner's serious difficulty in controlling his sexually violent behavior. Pet. App. 25a. Dr. Buck testified that petitioner suffers from several mental disorders and that those disorders affect his emotional and volitional capacity, predispose him to commit future acts of sexual violence, and make it substantially probable that he will commit future acts of sexual violence. *Ibid.* Petitioner relied in the appellate court on the part of Dr. Buck's testimony that he emphasizes here—that petitioner acted intentionally when he engaged in sexual abuse—but the appellate court properly rejected that argument, based on its review of Dr. Buck's days-long testimony as a whole:

> [Petitioner] seems to interpret this testimony to mean that he is able to control his sexually violent behavior and that, in effect, he could make a volitional choice to never again commit a sexually violent offense. However, such a conclusion does not follow from Dr. Buck's testimony. The mere fact that [petitioner] intentionally committed his sexual offenses does not mean that he has the volitional capacity to choose not to commit them. Dr. Buck never offered such an opinion and in fact testified that there is a substantial probability that [petitioner] will commit a future act of

> sexual violence. In this regard, Dr. Buck explained that [petitioner's] mental disorders "warp his perceptions and his feelings and allow him to exhibit sexually assaulting behavior.'" * * * [I]n Dr. Buck's expert opinion, [petitioner's] mental disorders impact his emotional and volitional capacity and predispose him to commit acts of sexual violence.

Pet. App. 26a-27a; see *Crane*, 534 U.S. at 412 (recognizing that "most severely ill people—even those commonly termed 'psychopaths'—retain some ability to control their behavior"). The appellate court thus correctly concluded that "Dr. Buck's statements regarding [petitioner's] volitional control, when considered in context of her entire testimony," are consistent with "the jury's verdict that [petitioner] is a sexually violent person." Pet. App. 26a-27a.

Petitioner seeks error correction by painting this as a case in which "*there is no proof at all* of a serious difficulty with behavioral control," Pet. 11-12 (emphasis in original), but the appellate court addressed this claim and properly concluded that the trial record as a whole included ample evidence to support the jury verdict.

C. Finally, petitioner suggests that certiorari review is warranted because some States have "[p]oorly [d]rafted" civil commitment laws, and that many such laws have survived constitutional challenge. Pet. 10-11. But here again petitioner alleges no split in authority—indeed, he suggests that the cases have all gone one way—and he does not imply, much less argue, that Illinois's law is unconstitutional. Nor could he. In all material respects, the Illinois statute is identical to the Kansas law upheld in *Hendricks* and *Crane*. Compare 725 Ill. Comp. Stat. 207/5(f), with *Hendricks*, 521 U.S. at 352. Thus, both the Illinois Supreme Court and the Seventh Circuit have upheld the Illinois statute, *Varner*, 800 N.E.2d at 794 (applying *Hendricks* and *Crane* to hold that statute "contains definitions

that supply the constitutionally required elements for civil commitment"); *Varner v. Monohan*, 460 F.3d 861, 864 (7th Cir. 2006) ("[o]nce a jury has found mental illness and a likelihood of future offenses, it has drawn the line the Court thought essential" in *Crane*), *cert. denied*, 549 U.S. 1288 (2007), and federal courts have rejected challenges to similar laws elsewhere, see *Laxton v. Bartow*, 421 F.3d 565, 571-572 (7th Cir. 2005) (Wisconsin); *Rose v. Mayberg*, 454 F.3d 958, 962 (9th Cir. 2006) (California); *Brock v. Seling*, 390 F.3d 1088, 1090 (9th Cir. 2004) (Washington); *Linehan v. Milczark*, 315 F.3d 920, 927 (8th Cir. 2003) (Minnesota).

Indeed, petitioner ultimately concedes that it is "likely * * * that a commitment order under a narrowly tailored state statute will satisfy the constitutional requirements," but objects that "focusing on the state statute by itself is not sufficient to ensure constitutional protections in every case." Pet. 11. Here, however, the Illinois Appellate Court did exactly what petitioner recommends—it "consider[ed] the constitutional issues independently" to "determin[e] whether the evidence in the record comports with the due process protections recognized in *Hendricks* and *Crane*." *Ibid.* After an exhaustive review of the trial evidence, the court applied *Crane*'s due process standard nearly verbatim to this evidence and properly held that it satisfied the constitutional standard. Compare *Crane*, 534 U.S. at 413 (offender must have "serious difficulty in controlling behavior"), with Pet. App. 23a-24a ("we find that there was sufficient evidence presented to establish that [petitioner] has serious difficulty controlling his sexually violent behavior").

In short, petitioner alleges no split in authority, levels no challenge to the Illinois commitment law, and received the individualized evaluation of the record evidence that he espouses. Petitioner seeks error correction based on the state appellate court's purported misreading of the trial record. But that is not grounds for certiorari review, and in any event the

state court correctly concluded—based on a thorough review of the record—that the evidence supported the jury's finding that petitioner has serious difficulty controlling his sexually violent conduct.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

BRAD LIEBERMAN, PETITIONER

*v.*

THE PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT*

## REPLY BRIEF IN SUPPORT OF CERTIORARI

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## INTRODUCTION

The Brief In Opposition ("Opp'n") filed on behalf of the State of Illinois pejoratively asserts that Petitioner requests "mere error correction" based upon his mischaracterization of the evidence in the record. (Opp'n 1.) To the contrary, Petitioner asks the Court to review this case because the Illinois Appellate Court refused to apply the principles of Due Process that this Court articulated in *Kansas* v. *Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997) and *Kansas* v. *Crane*, 534 U.S. 407, 122 S. Ct. 867 (2002). The Illinois Appellate Court deviated from those principles, and it further refused to define the quantum of evidence about lack of volitional control that is constitutionally mandated for post-incarceration civil commitment of sex offenders. The decision below deprived Petitioner of liberty without Due Process of law. Equally significant, its opinion will stand as authority that, at best, dilutes the importance of this Court's decisions in *Hendricks* and *Crane*, and at worst, eliminates their requirements altogether.

## ARGUMENT

### The Constitutional Question Of Whether A Convicted Sex Offender May Be Committed In the Absence Of Clear And Substantial Evidence Of Present Difficulty Controlling Behavior Is Squarely Presented By Petitioner's Case.

This Court has it made clear (and the State agrees) that not all convicted sex offenders may be civilly committed after their sentence of imprisonment ends. (Opp'n 9.) As this Court framed it, the issue is whether the offender facing

commitment presently suffers from "serious difficulty in controlling behavior," to be distinguished from the "dangerous but typical recidivist convicted in an ordinary criminal case" who cannot be civilly committed. *Crane*, 534 U.S. at 413. Petitioner's case presents a serious constitutional question about the quality and quantum of evidence necessary to make that decision—a question that directly affects his own case and thousands like it. The Appellate Court upheld the commitment order without so much as acknowledging the effect of the wealth of evidence demonstrating that Petitioner did not meet the constitutional requirements for civil commitment.

Even if the Appellate Court had applied the correct legal standard (which it did not), its decision nevertheless contradicts *Hendricks* and *Crane*. The Appellate Court's focus on Petitioner's past crimes is an error of law that is flatly in conflict with those decisions. *See Hendricks*, 521 U.S. at 360–361; *Crane*, 534 U.S. at 412.

The State does not challenge Petitioner's assertion that the following testimony was given by the State's experts at trial (Pet. 3–5):

- Dr. Jacqueline Buck testified that Petitioner presently possessed the ability to choose whether he will act on any urges he may experience. (Tr. Vol. 7 at 104.) "Q. Brad had volitional control because he is not mentally ill, is that true? A. You bet. That's true." *Ibid.* Lack of control and predisposition are different. (*Id.* at 103–104.) Petitioner's mental disorders may have predisposed him to

commit acts of sexual violence, but they do not reduce his ability or capacity to control his behavior. (*Id.* at 104, 105, 107, 109–110.) "All of his behavior over the past well–documented 26 years screams he has volitional control, volitional capacity. There is no doubt about that." (*Id.* at 109–110.) "Q. He has volitional capacity? A. Yes, and control. Q. And control? A. To do what he wants." (*Id.* at 110.) Petitioner's past and present behavior is completely consistent with full volitional control. (*Id.* at 108–109.)

- Dr. Barry Leavitt agreed that "under certain circumstances . . . [Petitioner] is capable of controlling his behavior." (Tr. Vol. 16 at 18.) Dr. Leavitt testified that Petitioner's mental disorders "affect" his volitional control. (*Id.* at 19.) Like Dr. Buck, however, he never testified that Petitioner lacked control or had any serious difficulty in controlling his behavior. Dr. Leavitt admitted that: "[I]n most situations in the last 26 years he's able to control his impulses." (*Id.* at 18–19; Tr. Vol. 9 at 174.) "Q. He's able to control his impulses? A. That is correct." (*Id.* at 175.)

If *Hendricks* and *Crane* have any meaning at all, the question presented by the foregoing evidence about Petitioner's *present volitional control* cannot be avoided: does this evidence allow the continuing deprivation of Petitioner's liberty or not? It light of its misapplication of this Court's precedent, however, the Appellate Court here did not engage that question at all.

The State's Opposition misses the point. The State uses ambiguous jargon (e.g., "color his viewpoint," "warps his perceptions," "impact . . . emotional and volitional control") and recitation of past offenses and discipline (e.g., "he was identified by sixteen women as having committed . . . sexually violent offenses," "he was disciplined five times for drugs or drug paraphernalia") in an effort to mask the legal issue presented here. (Opp'n 2–5.) Notably, the State even relies upon rank hearsay about Petitioner's alleged misconduct in prison—evidence that was not allowed to be considered for its truth at trial or on appeal but rather was recited by the State's experts in support of their opinions under an Illinois evidence rule based upon an old version of Federal Rule of Evidence 703.[1] (Opp'n 2–3.)

The State's non-answer to the constitutional question, like the Appellate Court's, is that the jury can decide the key constitutional issue in this case (about which it was not instructed) based upon other "ample" evidence. (Opp'n 11, 13.) But what kind of evidence—and how much—is "ample?" Neither evidence of a predisposition to violence, nor evidence of "dangerousness," is enough to support commitment. *Hendricks*, 521 U.S. at 357–358. In cases like this one, which sit at the intersection of

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[1] *See Wilson* v. *Clark*, 84 Ill. 2d 186, 195–96, 417 N.E.2d 1322, 1327 (Ill. 1981) (adopting the pre–2000 version of Fed. R. Evid. 703). Current Federal Rule 703 would limit or prohibit the use of inadmissible evidence relied upon by an expert if the prejudicial effect of the evidence outweighed its probative value. Ironically, the State in its Opposition violated the trial court's limiting instructions that the evidence could not be considered for its truth. (Opp'n 2–3.) That evidence cannot be used to support the judgment or to deny review by this Court.

science and law, careful judicial review of the psychiatric evidence is essential. *See Crane*, 534 U.S. at 413–414. Here, where virtually all of the evidence was expert testimony, i.e., beyond the ken of the average juror, the jury should have been given less discretion, not more, to interpret the evidence in the face of a serious constitutional challenge to its sufficiency. *See People* v. *Mertz*, 218 Ill. 2d 1, 842 N.E.2d 618 (Ill. 2005) (expert testimony is admissible when a qualified expert offers knowledge and application of principles beyond the ken of the average juror). Because the Appellate Court refused to answer the dispositive question about the required quantum of evidence, its judgment—and the law of Illinois—now conflicts with this Court's clear precedent.

Civil commitment of a convicted sex offender after imprisonment ends is not permitted in the absence of substantial competent proof that the offender presently suffers from "serious difficulty in controlling behavior." *Crane*, 534 U.S. at 412-413; *see also Hendricks*, 521 U.S. at 357-358. The State acknowledges that the Appellate Court failed to cite or discuss *Hendricks* and *Crane*, but it argues that the court nevertheless applied the principles of those cases when it discussed another Illinois Appellate Court decision, *In re Detention of Traynoff*, 358 Ill. App. 3d 430, 831 N.E.2d 709 (2005). (Opp'n 8, 10.)

But the Appellate Court's discussion of *Traynoff* demonstrates the very error about which Petitioner complains. The Appellate Court used that Illinois decision to bootstrap its unsupportable legal conclusion, namely that a finding of serious difficulty in controlling behavior was "implicit in the jury's

verdict." Pet. App. 22a, 24a. Stated differently, the Appellate Court held that generic pre-*Crane* language in the Illinois Sexually Violent Persons Commitment Act ("SVPCA"), 725 ILCS 702/1–702/99 (2006), allowed the jury to make a specific finding about the constitutional predicate for commitment in the absence of any rule defining the quantity or quality of the requisite evidence.

The Appellate Court's silence about *Hendricks* and *Crane* not only sets up a clear conflict between the law of Illinois and the Court's precedent, but it will also create confusion for other courts in similar cases. As noted in the Petition, other courts have hidden behind vague pre-*Crane* statutory language to uphold commitment orders and avoid claims based upon lack of sufficient evidence. (Pet. 10–12.) Here the Appellate Court used the imprecise language in the SVPCA to trump the considerable evidence in the record demonstrating that "all of [Petitioner's] behavior over the past well documented 26 years screams he has volitional control, volitional capacity." (Tr. Vol. 7 at 109–110.) This Court should grant the Petition to direct courts, and offer assurance to Petitioner and others like him, that a reasonable and fair determination about the present ability of the individual offender to control violent behavior must be made in every case.

In sum, Petitioner's assertions are not the slightest bit "cavalier." (Opp'n 11.) Absent review by this Court, the Appellate Court's opinion threatens to eviscerate the Due Process protections guaranteed by *Hendricks* and *Crane*.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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